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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1886

J. C. BANCROFT DAVIS

REPORTER

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1887

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MORRISON REMICK WAITE, Chief Justice.
SAMUEL FREEMAN MILLER, Associate Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOSEPH P. BRADLEY, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
WILLIAM BURNHAM WOODS, Associate Justice.*
STANLEY MATTHEWS, Associate Justice.
HORACE GRAY, Associate Justice.
SAMUEL BLATCHFORD, Associate Justice.

AUGUSTUS HILL GARLAND, Attorney General.
GEORGE AUGUSTUS JENKS, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN GEORGE NICOLAY, Marshal.

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* Mr. Justice Woods was ill and absent during the whole time covered by these decisions, and took no part in any of them. He died at Washington, on the 14th of May, 1887.

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CITED IN OPINIONS.

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(B.) Treaties.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1886.

EX PARTE BAIN.

ORIGINAL.

Argued March 8, 1887. — Decided March 28, 1887.

The declaration of Article V of the Amendments to the Constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is jurisdictional, and no court of the United States has authority to try a prisoner without indictment or presentment in such cases.

The indictment here referred to is the presentation to the proper court, under oath, by a grand jury, duly impanelled, of a charge describing an offence against the law for which the party charged may be punished.

When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a re-submission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the Constitution above recited, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case.

Upon an indictment so changed the court can proceed no farther. There is nothing (in the language of the Constitution) which the prisoner can "be held to answer." A trial on such indictment is void. There is nothing to try.

According to principles long settled in this court the prisoner, who stands sentenced to the penitentiary on such trial, is entitled to his discharge by writ of *habeas corpus*.

THIS was a petition for a writ of *habeas corpus*. The case is stated in the opinion of the court.

Mr. Richard Walke and *Mr. W. W. Crump* for the petitioner. *Mr. L. R. Page* was with them on the brief.

Mr. Attorney General and *Mr. John Catlett Gibson*, District Attorney for the Eastern District of Virginia, opposing.

MR. JUSTICE MILLER delivered the opinion of the court.

This is an application to this court for a writ of *habeas corpus* to relieve the petitioner, George M. Bain, Jr., from the custody of Thomas W. Scott, United States Marshal for the Eastern District of Virginia. The original petition set out with particularity proceedings in the Circuit Court of the United States for that district, in which the petitioner was convicted, under § 5209 of the Revised Statutes, of having made a false report or statement as cashier of the Exchange National Bank of Norfolk, Virginia. The petition has annexed to it as an exhibit all the proceedings, so far as they are necessary in the case, from the order for the impanelling of a grand jury to the final judgment of the court, sentencing the prisoner to imprisonment for five years in the Albany penitentiary. Upon this application the court directed a rule to be served upon the marshal to show cause why the writ should not issue, to which that officer made the following return:

"Comes the said Scott, as marshal aforesaid, and states that there is no sufficient showing made by the said Bain that he is illegally held and confined in custody of respondent; but, on the contrary, his confinement is under the judgment and sentence of a court having competent jurisdiction to indict and try him, and he should not be released; and respondent prays the judgment of this court, that the rule entered herein against him be discharged, and the prayer of the petition be denied."

The Attorney General of the United States and the District

Attorney for the Eastern District of Virginia appeared in opposition to the motion, and thus the merits of the case were fully presented upon the application for the issue of the writ.

Upon principles which may be considered to be well settled in this court, it can have no right to issue this writ as a means of reviewing the judgment of the Circuit Court, simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge. The jurisdiction of that court is denied in this case upon two principal grounds; the first of these relates to matters connected with the impanelling of the grand jury and its competency to find the indictment under which the petitioner was convicted; the second refers to a change made in the indictment, after it was found, by striking out some words in it, and then proceeding to try the prisoner upon the indictment as thus changed. We will proceed to examine the latter ground first.

Section 5209 of the Revised Statutes of the United States, under which this indictment is found, reads as follows:

"Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

Section 5211 requires every banking association organized under this act of Congress to "make to the Comptroller of the Currency not less than five reports during each year, . . . verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least three of the directors."

The indictment in this case, which contains but a single count, and is very long, sets out one of these reports, made on the 17th day of March, 1885, by the petitioner, as cashier, and Charles E. Jenkins, John B. Whitehead, and Orlando Windsor, as directors, of the Exchange National Bank of Norfolk, a national banking association. The indictment also points out numerous false statements in this report, which, it is alleged in the early part of it, were made "with intent to injure and defraud the said association and other companies, bodies politic and corporate, and individual persons to the jurors aforesaid unknown, and with the intent then and there to deceive any agent appointed by the Comptroller of the Currency to examine the affairs of said association." Following this allegation come the specifications of the particulars in which the report is false, and the concluding part charges that the defendants, "and each of them, did then and there well know and believe the said report and statement to be false to the extent and in the mode and manner above set forth; and that they, and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association, and to injure, deceive, and defraud the United States and said association and the depositors thereof, and other banks and national banking associations, and divers other persons and associations to the jurors aforesaid unknown, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The defendants having been permitted to withdraw the pleas of not guilty which they had entered, were then allowed to demur to the indictment, and as it is important to be accurate in stating what was done about this demurrer, the transcript of the record on that subject is here inserted:

"United States
v.
Geo. M. Bain, Jr., John B. Whitehead, Orlando Windsor and C. E. Jenkins. } Indictment for making false entries, &c.

"This day came the parties, by their attorneys, pursuant to the adjournment order entered herein on the 13th day of November, 1886, and thereupon the defendants, by their counsel, asked leave to withdraw the pleas heretofore entered, which, being granted, they submitted their demurrer to the indictment, which, after argument, was sustained; and thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words '*the Comptroller of the Currency and*' therein contained.

"Thereupon, on motion of John B. Whitehead and C. E. Jenkins, by their counsel, for a severance of trial, it was ordered by the court that the case be so severed that George M. Bain, Jr., cashier and director, be tried separately from John B. Whitehead, Orlando Windsor and C. E. Jenkins, directors.

"Thereupon the trial of George M. Bain, Jr., was taken up, and the said defendant, George M. Bain, Jr., entered his plea of not guilty."

This was done December 13, 1886, thirteen months after the presentment of the indictment by the grand jury, and probably long after it had been discharged.

A verdict of guilty was found against Bain, a motion for a new trial was made, and then a motion in arrest of judgment, both of which were overruled. The opinion of the circuit judge on the question which we are about to consider, delivered in overruling that motion, is found in the record.

The proposition, that in the courts of the United States any part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being re-submitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action in other courts, we are at once confronted with the fifth of those articles of amendment,

adopted early after the Constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury," except in a class of cases of which this is not one.

We are thus not left to the requirements of the common law, in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that "no person shall be held to answer" for such a crime, "unless on a presentment or indictment of a grand jury."

But even at common law it is beyond question that in the English courts indictments could not be amended. The authorities upon this subject are numerous and unambiguous. In the great case of *Rex* v. *Wilkes*, 4 Burrow, 2527, tried in 1770, which attracted an immense deal of public attention, Wilkes, after being convicted by a jury of having printed and caused to be published a seditious and scandalous libel, was brought up before the court of King's Bench on a motion to set aside the verdict, on the ground that an amendment had been made in the language of the information on which he was tried. In the course of an opinion delivered by Lord Mansfield overruling the motion, he remarks, on this subject (page 2569), that "there is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the King's suit. An officer of the Crown has the right of framing them originally; he may, with leave, amend in like manner, as any plaintiff may do."

Mr. Justice Yates, on the same occasion, said that indictments, being upon oath, cannot be amended (page 2570).

Hawkins, in his Pleas of the Crown, Book 2, c. 25, § 97, says:

"I take it to be settled that no criminal prosecution is

within the benefit of any of the statutes of Amendments; from whence it follows that no amendment can be admitted in any such prosecution but such only as is allowed by the common law. And agreeably hereto I find it laid down as a principle in some books, that the body of an indictment removed into the King's Bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is said that the body of an indictment from London may be amended, because, by the city charter, a tenor of the record only can be removed from thence."

He further says, § 98:

"It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the court sat, to award process against the grand jury to come into court and amend it. And it seems to be the common practice at this day, while the grand jury who found a bill is before the court, to amend it, by their consent, in a matter of form, as the name or addition of the party."

This language is repeated in Starkie's Criminal Pleading, p. 287. There are, however, several cases in which it has been decided that the caption of an indictment may be amended, and we therefore give here the language of Starkie, p. 258, as describing what is meant by the phrase "caption of an indictment."

"Where an inferior court," he says, "in obedience to a writ of *certiorari* from the King's Bench, transmits the indictment to the Crown office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the Crown office. The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment."

It will be seen that, as thus explained, the caption is no part of the instrument found by the grand jury.

Wharton, in his work on Criminal Pleading and Practice,

§ 90, says: "No inconsiderable portion of the difficulties in the way of the criminal pleader at common law have been removed in England by the 7 Geo. 4, c. 64, §§ 20, 21; 11 & 12 Vict., c. 46, and 14 & 15 Vict., c. 100, and in most of the states of the American Union, by statutes containing similar provisions." He also cites cases in the English courts, where amendments have been made under those statutes, but they can have no force as authority in this country, even if they permitted such amendments as the one under consideration.

No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. On the contrary, in the case of *Commonwealth* v. *Child*, 13 Pick. 198, 200, Chief Justice Shaw says: "It is a well-settled rule of law that the statute respecting amendments does not extend to indictments; that a defective indictment cannot be aided by a verdict, and that an indictment bad on demurrer must be held insufficient upon a motion in arrest of judgment."

In the case of the *Commonwealth* v. *Mahar*, 16 Pick. 120, the court, having held upon the arraignment of the defendant that the indictment was defective, the Attorney General moved to amend it, and the prisoner's counsel consented that the name of William Hayden, as the owner of the house in which the offence had been committed, should be inserted, not intending, however, to admit that Hayden was in fact the owner. "But the court were of opinion that this was a case in which an amendment could not be allowed, even with the consent of the prisoner."

In the case of *Commonwealth* v. *Drew*, 3 Cush. 279, Chief Justice Shaw said: "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects in the first."

In the case of the *State* v. *Sexton*, 3 Hawks (N. C.) 184,[1] the

[1] *S. C.* 14 Am. Dec. 584.

Supreme Court of that state said: "It is a familiar rule that the indictment should state that the defendant committed the offence on a specific day and year, but it is unnecessary to prove, in any case, the precise day and year, except where the time enters into the nature of the offence. But if the indictment lay the offence to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statutes of jeofails, and cannot therefore be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be affirmed."

It will be perceived that the amendment in that case had reference to a matter which the law did not require to be proved, as it was alleged, and which to that extent was not material.

The same proposition was held in the New York Court of General Sessions, in the case of *The People* v. *Campbell*, 4 Parker's Cr. Cas. 386, 387, where it was laid down that the averments in an indictment could not be changed, even by consent of the defendant.

The learned judge who presided in the Circuit Court at the time the change was made in this indictment, says that the court allowed the words "Comptroller of the Currency and" to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all

its language found in the charging part of that instrument. While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

The importance of the part played by the grand jury in England cannot be better illustrated than by the language of Justice Field in a charge to a grand jury reported in 2 Sawyer, 667:

"The institution of the grand jury," he says, "is of very ancient origin in the history of England — it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a body which

not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

The case of *Hurtado* v. *The People of California*, 110 U. S. 516, was a writ of error to the Supreme Court of that state, by a party who had been convicted of the crime of murder in the state court upon an information instead of an indictment. The writ of error from this court was founded on the proposition that the provision of the Fourteenth Amendment to the Constitution of the United States, that no state shall "deprive any person of life, liberty, or property, without due process of law," required an indictment as necessary to due process of

law. This court held otherwise, and that it was within the power of the states to provide punishment of all manner of crimes without indictment by a grand jury. The nature and value of a grand jury, both in this country and in the English system of law, were much discussed in that case, with references to Coke, Magna Charta, and to other sources of information on that subject, both in the opinion of the court and in an exhaustive review of that question by Mr. Justice Harlan in a dissenting opinion.

It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of *Jones* v. *Robbins*, 8 Gray, 329, "individual citizens" "from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury;" and "in case of high offences" it "is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions."

It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to

try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of *Ex parte Wilson*, 114 U. S. 417, and the later one of *Mackin* v. *United States*, 117 U. S. 348, establish the proposition that this prosecution was for an infamous crime within the meaning of the constitutional provision.

It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be "held to answer," he is then entitled to be discharged so far as the offence originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was

nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Wilson*, 114 U. S. 417, and other cases.

These views dispense with the necessity of examining into the questions argued before us concerning the formation of the grand jury and its removal from place to place within the district. We are of opinion that

The petitioner is entitled to the writ of habeas corpus, and it is accordingly granted.

WORDEN *v.* SEARLS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

Argued March 17, 1887. — Decided March 28, 1887.

Reissued letters-patent No. 5400, granted to Erastus W. Scott and Anson Searls, May 6th, 1873, for an "improvement in whip-sockets," on an application for reissue filed January 16, 1873, (the original letters-patent, No. 70,627, having been granted to E. W. Scott, November 5, 1867, on an application filed August 23, 1867,) are invalid, as an unlawful expansion of the original patent.

A whip-holder constructed in accordance with the specification and drawings of letters-patent No. 70,075, granted to Henry M. Curtis and Alva Worden, October 22, 1867, for an "improvement in self-adjusting whip-holder," did not infringe the original Scott patent, regarding the Scott invention as earlier in date than that of Curtis and Worden, and the Scott patent was reissued with a view of covering the device of Curtis and Worden.

In a suit in equity, on the patent, a preliminary injunction having been granted and violated, the Circuit Court, in proceedings and by two orders, entitled in the suit, found the defendants guilty of contempt, and, by one order, directed that they pay to the plaintiff $250, "as a fine for said violation," and the costs of the proceeding, and stand committed till payment; and, by the other order directed that the defendants pay a fine of $1182 to the clerk, to be paid over by him to the plaintiff "for damages and costs," and stand committed till payment, the $1182 being

made up of $682 profits made by the infringement, and $500 expenses of the plaintiff in the contempt proceedings; this court, in reversing a final money decree for the plaintiff, and dismissing the bill, reversed also the two orders, but without prejudice to the power and right of the Circuit Court to punish the contempt by a proper proceeding.

BILL in equity to restrain infringement of letters-patent and for assessment of damages. Decree for complainant, from which respondents appealed. The case is stated in the opinion of the court.

Mr. Charles J. Hunt for appellants. *Mr. Thomas S. Sprague* was with him on the brief.

Mr. J. P. Fitch for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Michigan, by Anson Searls against Alva Worden and John S. Worden, for the alleged infringement of reissued letters-patent, No. 5400, granted to Erastus W. Scott and Anson Searls, May 6, 1873, for an "improvement in whip-sockets," on an application for reissue filed January 16, 1873, the original letters-patent, No. 70,627, having been granted to E. W. Scott, November 5, 1867, on an application filed August 23, 1867. One of the defences set up in the answer is, that the reissued letters-patent are not for the same invention as that described and claimed in the original letters-patent, and contain new matter not contained or claimed in the original.

The specification and claim and drawings of the original patent are as follows:

"Be it known that I, E. W. Scott, of Wauregan, in the county of Windham and State of Connecticut, have invented a new and useful improvement in whip-sockets; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon.

Fig. 1.

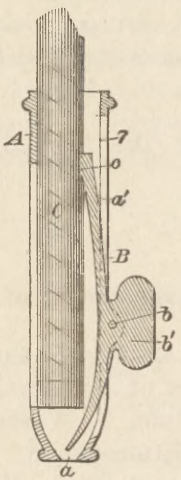
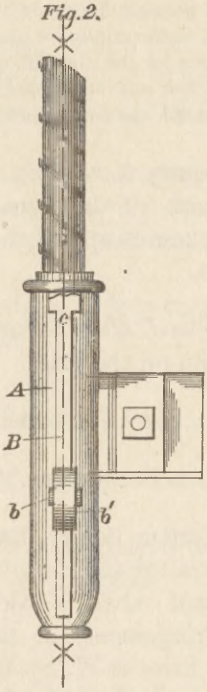


Fig. 2.



"This invention relates to a new and improved fastening applied to a whip-socket in such a manner as to hold the whip firmly therein, prevent it from moving or shaking laterally, and at the same time not interfere in the least with its ready insertion in the socket and its withdrawal therefrom. In the accompanying sheet of drawings, Figure 1 is a vertical central section of my invention taken in the line $x\ x$, Fig. 2; Fig. 2, an external view of the same. Similar letters of reference indicate like parts.

"The whip-socket A may be made of cast-iron, hard rubber, or any of the materials now used for such purpose. Cast-iron, however, would probably be the preferable material. The socket may have an opening, a, at its bottom, to admit of the escape of water, dust, &c., and in the side of the socket there is an opening or slot, a', extending nearly its whole height or length. In this slot there is secured a fulcrum-pin, b, a lever,

B, which is slightly curved, as shown clearly in Fig. 1, the fulcrum-pin being rather below the centre of the lever, and the latter provided with a projection, *b'*, near its fulcrum-pin, which renders the lower part of the lever heavier than its upper part, with its centre of gravity at one side of its fulcrum-pin, so that the upper end *c* of the lever will have a tendency to move out from within the socket, as indicated by the arrow 1. The lower end of the lever B is so curved as to extend within the lower part of the socket at all times, and, when the socket is empty, no whip in it, the upper end *c* of the lever will be in the slot *a*, if not out from it, so as not to form any obstruction to the butt of the whip C as it is shoved into the socket; but when the butt of the whip reaches the lower part of the socket it strikes the lower curved end of the lever B, and throws the upper end *c* of the same in contact with the butt (see Fig. 1), the weight of whip keeping the upper end *c* of the lever in contact with the butt, and holding the whip steady in the socket. In withdrawing the whip from the socket the upper end *c* of the lever moves freely outward from the butt as soon as the lower end of the lever is relieved of the weight of the whip. This simple device has been practically tested, and it operates well. There are no springs required, and no parts used which are liable to get out of repair, or become deranged so as to be inoperative.

"Having thus described my invention, I claim as new and desire to secure by letters-patent:

"A whip-socket provided with a fastening composed of a lever, arranged or applied substantially as shown and described, to hold the whip steady or firm in its socket, as set forth."

The specification and claims of the reissue are as follows, the drawings of the reissue being substantially the same as those of the original:

"Be it known that I, Erastus W. Scott, of Wauregan, in the county of Windham and state of Connecticut, have invented certain new and useful improvements in whip-sockets, which are simple in construction, efficient in operation, and durable in use; and the improvements consist in the use of a

lever with the stationary or upright portion of the socket, and in the construction and combination of the parts, as hereinafter more fully described; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawing, with letters of reference marked thereon, forming a part of this specification, in which Fig. 1 is a central vertical section, taken on line *x x* of Fig. 2, of a socket embodying my invention, and Fig. 2 is an elevation of the same.

"A represents a tubular socket provided with a suitable flange at the top, and the interior of the bottom part of the socket gradually decreases in size, being constructed in a partially cone form, as shown. The socket A is provided with a suitable fastener for the purpose of securing the same to the carriage. The socket A is provided with a slot *a'*, extending a sufficient distance to admit the lever B, which is suitably pivoted to the part A in such a manner as to move on its pivot, for a purpose presently described. This lever B extends upward and downward from its pivot and inclines or curves inward from the pivot to each end, so that each end of the lever, or a point near each end of the lever, forms a bearing point for the whip C when inserted in the socket, while the opposite side of the whip-stock C bears upon the socket A, as shown in Fig. 1. The lever B is pivoted to the socket A at a point inside of its centre of gravity, so that when the whip is removed the upper part of the lever automatically moves outward, as indicated by the arrow, leaving the top of the socket open for the reception of the whip. The same outward movement of the top of the lever would be caused by the butt of the whip when withdrawn from the socket.

"The operation is as follows: The whip C being removed from the socket, the upper part of the lever falls outward, as above described, leaving the top of the socket open. The whip, then being again inserted in the socket, first comes in contact with the lower inclined or curved part *e* of the lever B, and, as the whip passes down, the lower part *e* of the lever is pressed outward, which action brings the upper part *c* inward

until it is brought to bear firmly against the whip C, and thus holding the whip securely between the lever and the opposite side of the socket A. By this means a whip of any ordinary size may be firmly and securely held in position.

"Having thus fully described the invention, what is claimed and desired to be secured by letters-patent is —

"1. The combination of a stationary part of a whip-socket and a lever, the lever being hinged or pivoted so that the lever bears against the whip at or near the ends of the lever, to hold the whip in position, for the purpose set forth.

"2. The lever B, curved or inclined inward from its point of pivot, and used in connection with the stationary part A, substantially as and for the purpose specified.

"3. The lever B, pivoted at a point inside of its centre of gravity, so that when left free the upper part of the lever will fall outward, substantially as and for the purpose set forth."

The bill was filed in July, 1880. On the 19th of July, 1880, a preliminary injunction was issued and served. In the answer, filed in September, 1880, it was set up that the defendants were making and selling whip-sockets constructed under and in accordance with the specification and drawings of letters-patent No. 70,075, owned by them, granted to Henry M. Curtis and Alva Worden, October 22, 1867, for an "improvement in self-adjusting whip-holder." After replication and proofs, the case was heard, and, on the 24th of February, 1882, an interlocutory decree was made, declaring that the reissue was valid and had been infringed, and awarding a perpetual injunction, and a reference as to profits and damages. On the 6th of March, 1882, an order was made, entitled in the cause, imposing a fine of $250 on the defendants, to be paid by them to the complainant, for a violation of the preliminary injunction. This order was opened on the 29th of April, 1882, for a further hearing, and on the 9th of October, 1882, an order was made, entitled in the cause, imposing a fine of $1182 on the defendants for such violation, to be paid to the clerk of the court, and by him to be paid over to the plaintiff for damages and costs, the defendants to stand committed until the same should be paid. 13 Fed. Rep. 716. An

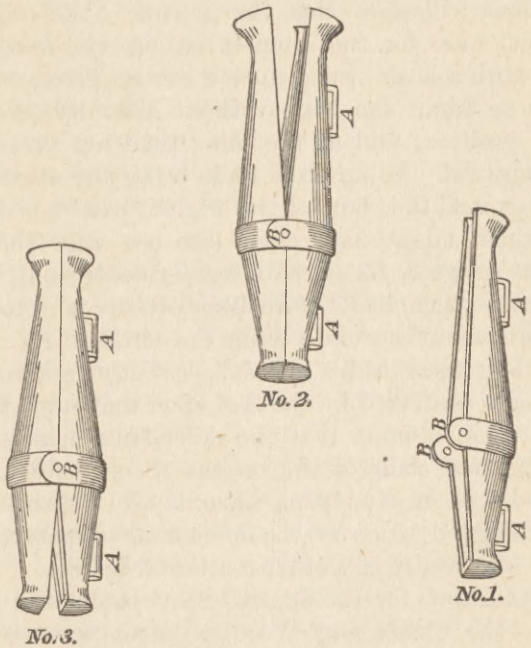
appeal by the defendants from this order was allowed, and an order was made that all proceedings to enforce the collection of the fine be stayed until the further order of the Circuit Court, on the giving of a specified bond, which bond was given. On the report of a master on the reference under the interlocutory decree, a final decree was entered that the plaintiffs recover against the defendants $24,573.91 as profits and $386.40 costs. From this decree the defendants have appealed.

The specification and claim and drawings of the Curtis and Worden patent are as follows:

"Be it known that we, Henry M. Curtis and Alva Worden, of Ypsilanti, in the county of Washtenaw and State of Michigan, have invented a new and useful machine for holding carriage-whips, which we denominate 'Curtis and Worden's Self-Adjusting Whip-Holder;' and we do hereby declare that the following is a full, clear, and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part of this specification, in which Figure 1 is a sectional view. Fig. 2 is a perspective view of the whip-holder complete, and ready for use, without the whip. Fig. 3 is a perspective view of the whip-holder complete, closed upon the whip-handle.

"The whip-holder is formed of metal, cast or pressed to the desired shape, and is composed of two pieces only, Fig. 1 representing one sectional half and the other sectional half being formed exactly like it, with the exception of the loops A A, used for the purpose of attaching the same to the carriage-seat or dash-board. Each section of the whip-holder is a cone-shaped half-cylinder, the cone being reversed near the bottom of the whip-holder, forming each half-section bilged or barrel-shaped, and connected together at the bilge by an ear-shaped hinge, B, on each half-section, the ears being connected together by a rivet, forming the hinge. The edge or face of each cylinder-section is formed by an obtuse angle at the hinge, so constructed that when the two sections are connected together at the hinge B the whip-holder above the joints or hinge is open, and shut or closed below from its own

weight, as in Fig. 2. When the whip is inserted the holder opens at the bottom, below the joints or hinge, by the pressure of the whip upon the convex conical sides of the holder, and



closes at the top of the holder around the whip, thus clasping the whip firmly at the top and bottom of the holder, and holding it steady and firmly in its place. The whip may be easily drawn out by a perpendicular motion, the holder opening at the top and closing at the bottom, so that the whip is readily detached.

"What we claim as our invention, and desire to secure by letters-patent is —

"The shape and construction of the whip-holder, and the connection of the two sectional halves by hinges or joints, in such a manner as to hold the whip, when inserted, closely and firmly, by clasping the same at the top and bottom of the holder at the same time, the holder being formed of metal,

cast or pressed into proper shape, substantially as and for the purpose set forth and described."

The Circuit Court, in deciding the case, 11 Fed. Rep. 501, and 21 Off. Gaz. 1955, said: "A glance at the drawings and specifications will show that the patents" (the original and the reissue) "are for the same invention, viz., a whip-socket arranged with a lever swung upon a central pivot, and operating so as to admit the whip without difficulty, and hold it firmly in position, and at the same time not preventing its easy withdrawal. So far from there being any attempt in the reissue to expand the claim of the original patent, and embrace devices which might have come into use since the original patent was granted, its purpose was evidently only to make that definite which had before been obscure, and to set forth in more precise and accurate terms the details of the invention. I regard the reissue in this case as a perfectly legitimate use of the privileges conferred by the Act upon that subject."

As we are of opinion that the defendants' whip-socket did not infringe the claim of the original Scott patent, and that the reissue was, in its claims, an unlawful expansion of the original, designed to cover the defendants' structure, it is not necessary to consider any other matter of defence.

The application for the original Scott patent and the application for the Curtis and Worden patent were before the Patent Office at the same time. The application for the Scott patent was filed August 23, 1867. It was issued November 5, 1867. The Curtis and Worden patent was issued October 22, 1867. The date it was applied for is not shown. Although the date of the Scott invention may be earlier than that of the Curtis and Worden invention, each patent was evidently granted for the specific apparatus covered by its claim. There was no conflict or interference between them, and no interference between their claims was declared. Their claims, as granted, placed side by side, were as follows:

Curtis and Worden.	*Scott.*
"The shape and construction of the whip-holder, and	"A whip-socket provided with a fastening composed of

the connection of the two sectional halves by hinges or joints, in such a manner as to hold the whip, when inserted, closely and firmly, by clasping the same at the top and bottom of the holder at the same time, the holder being formed of metal, cast or pressed into proper shape, substantially as and for the purpose set forth and described."

a lever, arranged or applied substantially as shown and described, to hold the whip steady or firm in its socket, as set forth."

The specification of the original Scott patent stated the invention to be "a new and improved fastening applied to a whip-socket." The socket is described as a complete whip-socket, complete in itself without the fastening, and having in its side an opening or slot, extending nearly its whole height or length, in which slot is inserted a lever. The claim is for "a whip-socket," that is, a complete whip-socket, "provided with a fastening composed of a lever, arranged or applied substantially as shown and described," that is, inserted in the slot in the socket. The defendants' structure consists only of two sectional halves, each like the other, and each a cone-shaped half-cylinder, and bilged, with an ear-shaped hinge on each half-section, a rivet connecting the two forming the hinge. This arrangement does not infringe the claim of the Scott original patent. It is not a complete whip-socket provided with a lever arranged or applied substantially as in Scott's apparatus, that is, pivoted in a slot in the socket. It is true that the result in each arrangement is to hold the whip steady or firm in a socket, but the mechanisms are different.

That the specification and claims of the reissue were designedly so worded as to cover a structure which the claim of the original patent would not cover is manifest. Thus, the original specification says that the invention relates to a "fastening applied to a whip-socket in such a manner as to hold the whip firmly therein." This means that you have a complete whip-socket and you apply a fastening to it, which fasten-

ing is so arranged as to hold the whip firmly in the socket in which the whip is placed. The description in the original specification describes a complete whip-socket, with an opening or slot in the side of the socket, extending nearly its whole height or length, with a fastening lever secured in the slot by a fulcrum-pin rather below the centre of the lever, the lever having near the fulcrum-pin a weighting projection, b'. The reissued specification says that the "improvements consist in the use of a lever with the stationary or upright portion of the socket." The socket is referred to as if it had a part which is not stationary. The first and second claims carry out the same idea, by making the "stationary part" of the socket an element in each of those claims. The defendants' holder is not a complete holder with its stationary part alone, and without its movable part, while the plaintiff's is. Moreover, all mention of the weighting projection b' is omitted in the reissued specification. The design manifest in it is to cover such a structure as that of the defendants, and the evidence tends to the conclusion that that was the object of obtaining the reissue. The description and claim of the original specification were entirely adequate to cover the Scott device. No inadvertence, accident or mistake is shown.

The reissue is sought to be sustained, by the counsel for the appellee, on the ground that the invention described in each of the two specifications is "the combination with a whip-socket of a lever which operates to hold the whip firmly therein and prevent it from moving or shaking laterally." Even if such a claim would be valid, it is not the claim made in the original patent. And even if it were the claim made by that patent, the reissue purports to claim, not a combination of a whip-socket and a lever, but the combination of the stationary part of a whip-socket and a lever.

We are, therefore, of opinion that this reissued patent is invalid.

The appellants ask for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this court cannot review the action of the Circuit Court in punishing a contempt committed by a

violation of such injunction, (1) because the proceedings were criminal in their character; (2) because the action of the Circuit Court is, by § 725 of the Revised Statutes, expressly made discretionary.

All the proceedings which resulted in the imposition of the fines were taken and entitled in the suit. The order of March 6, 1882, is entitled in the suit, and adjudges "that the said defendants are guilty of the contempt charged against them for a violation of the injunction issued in this cause, and that said defendants, Alva Worden and John S. Worden, pay to said complainant, Anson Searls, the sum of two hundred and fifty dollars, as a fine for said violation, together with costs of said proceedings, to be taxed, and that said defendant stand committed until the same be paid." The order of October 9, 1882, is entitled in the suit, and orders "that said defendants, Alva Worden and John S. Worden, do pay a fine of eleven hundred and eighty-two dollars to the clerk of this court, to be paid over by said clerk to complainant for damages and costs, and that said defendants do stand committed until the same is paid." It appears that the $1182 was made up of $682, the profits of the defendants on 62 gross of whip-sockets sold, and $500, expenses of the plaintiff in the contempt proceedings.

We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent. The case differs, therefore, from that of *Ex parte Kearney*, 7 Wheat. 39. That was an application to this court for a writ of habeas corpus where a person was imprisoned by the Circuit Court of the District of Columbia, for a contempt in refusing, as a witness, to answer a question on the trial of an indictment. The application was denied on the ground that this court had no appellate jurisdiction in a criminal case.

So, the fact in the present case, that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses, distinguishes the case from that of *New Orleans* v. *Steamship Co.*, 20 Wall. 387. There, in a suit in equity, a Circuit Court of the United States imposed a fine on a defendant for obtaining, during the pendency of the suit, from a State Court, an injunction against the plaintiffs, as to a matter within the scope of the litigation. On appeal from the final decree, it was sought to review the order imposing the fine, but this court said that the fine was beyond its jurisdiction, and added: "Contempt of court is a specific criminal offence. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

Section 725 of the Revised Statutes provides that the courts of the United States shall have power to punish, "by fine or imprisonment, at the discretion of the court, contempts of their authority," provided that such power "shall not be construed to extend to any cases except . . . the disobedience by . . . any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." We do not think this provision makes the action of the Circuit Court in this case such a matter of discretion that the orders imposing the fines are not reviewable. They were, to all intents and purposes, orders in the course of the cause, based on the questions involved as to the legal rights of the parties.

Although the court had jurisdiction of the suit and of the parties, the order for the preliminary injunction was unwarranted as a matter of law, and the orders imposing the fines must, so far as they have not been executed, be held, under the special circumstances of this case, to be reviewable by this court, under the appeal from the final decree. The result is, that they cannot be upheld.

Syllabus.

The final decree of the Circuit Court, and the orders of March 6, 1882, and October 9, 1882, are reversed, and the case is remanded to that court with a direction to dismiss the bill, with costs, but without prejudice to the power and right of the Circuit Court to punish the contempt referred to in those orders, by a proper proceeding. The preliminary injunction was in force until set aside. (See *In re Chiles*, 22 Wall. 157.)

RICHMOND *v.* IRONS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Submitted January 7, 1887. — Decided March 28, 1887.

A bill in equity filed by a judgment creditor of an insolvent national bank, which alleges that the president of the bank, under cover of a voluntary liquidation, was converting its assets, in a manner stated in the bill, in fraud of the rights of the complainant and other creditors, and which prays a discovery of all the assets, and of what moneys and assets have come into the president's hands, and what disposition has been made of them, and that the sales and conveyances of corporation property may be set aside, and that the property of the bank may be delivered up to the court, and that a receiver be appointed, and that the proceeds of the property may be applied to the payment of the complainant's debt, is in fact a bill to obtain judicial administration of the affairs of the bank, and to thus secure the equal distribution of its property: and an amended bill which states that it is filed on behalf of the complainant and of all the creditors who may become parties, and which charges that some stockholders named have parted with their stock for assets of the bank after it had gone into liquidation and in fraud of the creditors, and which prays that all the stockholders may be individually subjected to the liability created by the statute, and that the fund realized from the assets and from this liability may be distributed among the creditors, is germane to the original bill, and does not materially change the substance of the case nor make it multifarious, so as to make the allowance of the amendment an improper exercise of the discretion of the Circuit Court, within the rule laid down in *Hardin* v. *Boyd*, 113 U. S. 761.

Under the original act respecting national banks, and before the act of June 30, 1876, 19 Stat. 63, a court of equity had jurisdiction of a suit to

prevent or redress maladministration or fraud against creditors in the voluntary liquidation of such a bank, whether contemplated or executed; and such suit, though begun by one creditor, must necessarily be for the benefit of all.

The act of June 30, 1876, 19 Stat. 63, whether considered as declaratory of existing law, or as giving a new remedy, warranted the Circuit Court in granting leave to file the amended bill in this case.

The rights, under a statute of limitations, of a creditor who becomes party to a pending creditors' bill depend upon the date of the filing of the creditors' bill, and not upon the date of his becoming a party to it.

The statutory liability of a shareholder in a national bank for the debts of the corporation survives against his personal representatives.

A stockholder in a national bank continues liable for the debts of the company, under the statutes of the United States, until his stock is actually transferred upon the books of the bank, or until the certificate has been delivered to the bank, with a power of attorney authorizing the transfer, and a request, made at the time of the transaction, to have the transfer made: a delivery to the president of the bank as vendee and not as president is insufficient to discharge the shareholder under the rule in *Whitney* v. *Butler*, 118 U. S. 655.

Without express authority from the shareholders in a national bank, its officers, after the bank goes into liquidation, can only bind them by acts implied by the duty of liquidation.

Creditors of a national bank who, after it suspends payment and goes into voluntary liquidation, receive in settlement of their claims bills receivable, indorsed or guaranteed in the name of the bank by its president, cannot claim as creditors against the stockholders; as the original debt is paid, and the stockholders, in the absence of express authorization, are not liable on the contract of indorsement or guarantee, made after suspension.

A shareholder in a national bank, who is liable for the debts of the bank, is liable for interest on them to the extent to which the bank would have been liable, not in excess of the maximum liability fixed by the statute.

The expenses of a receivership of a national bank appointed in a creditors' suit, contesting a voluntary liquidation of the bank, cannot be charged upon stockholders as part of their statutory liability, but must come from the creditors, at whose instance the receiver was appointed.

No person is entitled to share as a creditor in the distribution under a creditor's bill, who does not come forward to present his claim.

THE original bill in this case was filed February 3, 1875, by James Irons, the defendants being the Manufacturers' National Bank of Chicago, organized under the national banking act, and Ira Holmes, its president. The bill alleged that the complainant had recovered a judgment against the bank for the sum of $12,408.51 damages, besides costs, an execution on

which had been returned unsatisfied; that on or about October 11, 1873, the bank had suspended payment and business, and, in pursuance of § 44 of the banking law, had gone into voluntary liquidation, its affairs having been put into the hands of the defendant Holmes, its president, for that purpose; that the defendant Holmes had thereafter settled a large amount of the indebtedness of the bank by giving notes made by him as president of the bank and guaranteed by him as such, and by using the assets of the bank in payment of its indebtedness; that he had also converted and appropriated to his own use an amount of the assets of the bank charged to be not less than $250,000; that he also had in his possession and control a large amount of the personal and real property purchased with the funds and moneys of the bank, but which he had fraudulently withheld and disposed of for his own use; "that the said voluntary liquidation aforesaid, and the proceedings thereunder by the said defendant Holmes, were a pretence and sham, and were suggested, instituted, and carried on for the sole and only purpose of concealing and covering up the transactions of the said bank, and of dissipating and disposing of its assets in such a way and manner most agreeable to the wishes and interests of the said defendant Holmes and those in his interest, and in fraud of the rights of your orator and the other creditors of the said bank;" that the capital stock of the bank actually paid in amounted to the sum of $500,000, owned by twenty-four stockholders, a schedule of the names of whom, with their respective places of residence, and the number of shares owned by each, were set out in an exhibit to the bill.

The bill prayed for a discovery under oath of "what moneys, cash, notes, bills receivable, United States bonds, and other property and effects the said bank had in its possession and was the owner of at the time of the said suspension thereof, and at the time the same went into voluntary liquidation in the manner as aforesaid, or what moneys, cash, notes, bills receivable, United States bonds, and other property the said bank has since had in its possession or control, or been the owner of, or the said Holmes, as president thereof, or other-

wise, has since had in his possession or control belonging to the said bank, and what disposition, payment, sale, or transfer has been made of the property and effects of the same and every part thereof." It also prayed that all sales and conveyances made by the bank or by the defendant Holmes of property belonging to the bank might be set aside as fraudulent, and that all the property and effects of the bank in its possession, or in the possession of Holmes, might be delivered up into the possession and control of the court, and applied, so far as necessary, to the payment of the complainant's judgment; that the defendants might be enjoined from making any further transfers of the property of the bank; that a receiver might be appointed of all the property and effects of the bank, and for general relief.

At various times subsequent to the filing of the bill other judgment creditors of the bank filed petitions for leave to be made parties, and were allowed to join in the bill as co-complainants. On the 12th of February, 1875, the defendants interposed a demurrer to the bill. The grounds of the demurrer were, among others, that a creditor's bill in behalf of one or more creditors would not lie, because the assets must be equally distributed among all; that a receiver of a national bank could only be appointed and the assets distributed by the Comptroller of the Currency under the act of Congress, and that the court had no power to enjoin a national bank from disposing of its assets in voluntary liquidation.

On the 26th of February, 1875, the demurrer was overruled, and Joel D. Harvey was appointed a receiver with full power and authority to take and receive possession and control of all the property of the bank, with directions to collect and convert the same into money, to be applied according to the order and direction of the court.

On the 1st of April, 1875, the defendants filed a joint and several answer to the bill. They admitted that the bank went into voluntary liquidation on September 26, 1873, and between that time and the time of filing the bill that it settled a large amount of its indebtedness, so that there remained due to its depositors only $39,000; and alleged that these settlements

were made mainly by paying out to creditors the assets of the bank, in some cases the defendant Holmes giving his personal obligations, which in a few instances were endorsed by him as president of the bank. The defendant Holmes denied all the fraud charged in the bill, and particularly that he had converted and appropriated to his own use any of the assets of the bank, and denied that he had any of such assets in his possession or under his control; and alleged, on the other hand, that he had given his private obligations in payment of the debts of the bank, which had more than exhausted all his resources and brought him into a state of bankruptcy.

The said Holmes, as president, and for himself personally, also averred in the answer, "that at the time said bank went into voluntary liquidation as aforesaid he verily believed that said bank and himself were solvent, and would be able to pay their debts in full by making settlements with the creditors to their satisfaction, and they, these defendants, so believed, while making said settlements, and he was advised by his attorneys, and so believed himself, that all settlements made with the creditors of said bank in the manner aforesaid, pursuant to said 42d section of the national banking act, would be valid, and that both said bank and its creditors so settled with would be protected, and that said settlements could not be set aside or in any manner interfered with; that, acting upon this advice, and what he believed to be the unquestioned law in the premises, said bank and its creditors, believing that they were within the letter and spirit of said section of the banking act, effected settlements to the amount of about $900,000, aside from reducing its capital stock to $178,000, and these defendants now claim that said settlements are all valid, and cannot be inquired into."

On October 5, 1876, leave was given the complainant to file an amended bill making additional defendants, and it was filed on the same day. The amended bill alleged that the bank suspended payment on September 22, 1873; that it had been previously and ever since had continued to be insolvent; that the complainant was a creditor by judgment, as stated in the original bill, on which execution had been returned

unsatisfied; that the bank, after suspending payment, went into voluntary liquidation under the management of the defendant Holmes, who settled a large amount of the indebtedness of the bank, so as to reduce it to about $40,000. The amended bill then set out the names of the various stockholders of the bank, with the amount of shares owned by each, and alleged that while the bank was contemplating insolvency, and was in fact insolvent, and after the suspension of payment, certain of the persons named as stockholders, and who were also made defendants, combining and confederating with the defendant Holmes, surrendered and delivered up to him, the said Holmes, the certificates of shares of stock held by them respectively, on some pretended contract of purchase, the same having been purchased with the money and assets of the bank, and cancelled at the request and by the direction of the said stockholders for the avowed purpose of releasing them, and each of them, from any personal liability on account thereof to the creditors of the said bank; but that, nevertheless, the same were never in fact cancelled or transferred on the books of the bank, but then stood on said books in the names of the said defendants; and it was charged that the said pretended purchase and attempt at cancellation of the said stock was a fraud upon the complainant and the other creditors of the said bank, and should be set aside.

The bill accordingly prayed for a discovery from the defendants of the facts in relation to the said transactions, and that the same might be set aside and decreed to have been made in fraud of the rights of the complainant and the other creditors of the bank; and "that the said stockholders, and each of them, be subjected to the liability created by the statute thereon in the same manner and to the same extent as though such sales, transfers or surrenders had never been made; and that the said stockholders, or such of them as have sold, transferred or surrendered, or pretended to sell, transfer or surrender, &c., the shares of stock so as aforesaid held and owned by them at the time the said bank suspended payment, in the manner as aforesaid, may be decreed to hold the moneys, property and effects received by them for said stock, in the

manner as aforesaid, in trust for the creditors of the said bank, and, upon the respective amounts being ascertained, that they be decreed to pay the same to creditors thereof, or to such person or persons as your honors shall order and direct."

The bill also prayed "that an account be taken of the amounts due from each of the said defendants to your orator and the judgment and other creditors of the said bank as stockholders thereof, upon the basis of the number of shares of stock held by them at the time the said bank suspended payment in the manner as aforesaid, in pursuance of the provisions of the act under which the said bank was organized, and by which the liability of the stockholders thereof is fixed and determined. That a full and complete and accurate account be taken of all the sales, transfers or surrenders, or pretended sales, transfers, &c., of stock made by the said stockholders of the said bank, or any of them, after the same suspended payment in the manner as aforesaid, and to the amounts received by them respectively for any such sales, transfers, &c., and that they may be decreed to hold the same in trust for the creditors of said bank in the manner as hereinbefore prayed, and that upon such accounts being taken the said defendants, or such of them as shall be found liable to your orator and the judgment and other creditors of the said bank upon the said stock liability created by the said banking act, and such of them as shall be liable for the amounts received by them for the sales and transfers of stock so made by them in the manner as aforesaid, be decreed to pay whatever amount shall be due from them, and each of them respectively, into court or to the receiver duly appointed by said court, and that out of the fund so created your orator's judgment be paid in full, and the balance thereof be distributed among the other creditors of said bank in such way and manner as your honors shall direct."

All of the defendants named in the amended bill within its jurisdiction were served with process and appeared. On behalf of certain of these defendants a motion was made to strike the amended bill from the files, and others filed demurrers, for the reason, in substance, that it made a new

case, different from that set out in the original bill and inconsistent with it, containing matters and asking relief that could only be properly obtained by an original bill.

On the 9th of May, 1877, the complainant, James Irons, having died, a bill of revivor was filed in the name of his personal representatives.

On October 1, 1878, the motion to strike from the files and the demurrers interposed to the amended bill were overruled, and the defendants required to answer. Subsequently, answers were filed at various times by the several defendants who appeared, the contents of which it is not necessary here particularly to notice, except to say that issue was joined by replication duly filed. On July 23, 1883, on the final hearing, the complainant had leave to amend, and did amend, the amended bill of complaint so as to allege expressly that it was filed on behalf of himself and all other creditors of the Manufacturers' National Bank of Chicago; the prayer being amended so as to require an account to be taken of the amount due the complainant and other creditors of the defendant; striking out those parts which asked that the complainant's judgment be decreed to be a first lien on the property of the bank, and paid first in full out of the fund for distribution; and adding a prayer that the fund so created might be distributed among all the creditors of said bank *pro rata*, in such a way and manner as should be directed. To this amended bill, as finally amended, various defendants filed several answers *instanter*, setting up by way of a bar to the relief prayed for against the defendants, as holders of the shares of stock in the banking association, the statute of limitations of five years of the state of Illinois; and also insisting that the bill as amended was multifarious and inconsistent, because it prayed for further and different relief from that authorized by the act of Congress approved June 30, 1876. On the same day a decree was entered in the cause, which found, among other things, as follows: That the Manufacturers' National Bank of Chicago became insolvent and suspended payment September 22, 1873, and, in pursuance of the act of Congress, went into voluntary liquidation on September 26, 1873; that

debts of the bank were still due and unpaid; that, at the time of the bank's insolvency and suspension of payment, the capital stock of the bank consisted of 5000 shares, of the par value of $100 each, setting out the names of the owners thereof, with the number of shares owned by each; that after the said bank had become insolvent and suspended payment, certain shareholders of said bank transferred the stock held by them, but that all and each of such transfers were and are in derogation of the rights of creditors, and were and are invalid; and that certain named defendants, shareholders of said bank, setting out their names, are individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of the bank to the extent of the amount of stock standing in their names respectively, on the 23d of September, 1873, and before any transfers were made that day, at the par value thereof, in addition to the amount invested in such bank.

The death of a defendant, William H. Adams, on the 5th of June, 1882, was suggested, and Elizabeth Adams, his executrix, made a party defendant in his stead.

By an order entered May 7, 1879, the case was referred to Henry W. Bishop, Esquire, a master in chancery, to take proof and report, first, the amount of the debts of said bank still unpaid and the amount due each creditor thereof; second, the value of the assets, if any, of the bank; third, the amount of assessment necessary to be made on each share of the capital stock of said bank in order to fully pay the indebtedness of the bank, and the amount due and payable from each shareholder upon such assessment.

On the 6th of January, 1885, the master reported his findings under the decree of July 23, 1883. He reported the amount of the debts of the bank unpaid as of the 1st of November, 1884, to be $368,971.50, the name of each creditor and the amount due him being set out in a schedule. The claims of these creditors were also classified by the master as follows: 1st, for clerical services to the bank, $183.31; 2d, for past services of the receiver and his attorneys, $4437.04; 3d, claims arising before the failure of the bank, upon which no

collaterals were taken, $179,231.81; 4th, claims arising before the failure of the bank, on account of which worthless collaterals had been subsequently received, $185,119.34. The master further reported that there were no assets of the bank outside of the stockholders' liability, and that the amount of assessment necessary to be made upon each share of the capital stock of the bank, in order to fully pay the indebtedness, was ninety per cent. A schedule attached to the report gave the name of each stockholder, and opposite his name the number of his shares of stock in the bank, the par value thereof, the per cent. of assessment to be levied thereon, and the amount due and payable from him upon such assessment. These stockholders were also classified as embracing, 1st, stockholders who had been duly served with process or entered their appearance in the cause; 2d, stockholders who had obtained a discharge in bankruptcy and were not liable to stock assessments on that account; and, 3d, stockholders who resided outside the jurisdiction of the court and had not been found within the district.

On February 2, 1885, various exceptions were filed on behalf of the defendant stockholders to this report of the master. An exception thereto was also filed on behalf of the receiver and creditors so far as it reported in favor of certain stockholders claiming to have been discharged from their liability by their certificates in bankruptcy. Upon the hearing of these exceptions, the court referred the cause again to the master to compute from the proofs already taken in the cause, 1st, the indebtedness of the bank at the time of the failure; 2d, subsequent actual payments upon indebtedness; 3d, net amount of indebtedness, with interest on same at the rate of six per cent. per annum from the time of the failure of the bank; and, 4th, the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership.

In pursuance of this direction, on the 25th of May, 1886, the master made a supplemental report, in which he found that the indebtedness of the bank at the time of the failure thereof, to wit, the 23d day of September, 1873, amounted in

the aggregate to the sum of $410,064.10; that the subsequent actual payments upon said indebtedness amounted to the sum of $213,018.46; that the net amount of the indebtedness was the sum of $197,045.64; that the interest upon said last mentioned sum from the 23d of September, 1873, when the bank failed, down to May 21, 1886, at the rate of six per cent. per annum, was the sum of $149,686.98, making the total unpaid indebtedness of said bank on the last mentioned date the sum of $346,732.62; that twenty per cent. upon said last mentioned sum, amounting to the sum of $69,346.52, was necessary to be added thereto for the expenses of the receivership, making a total sum of $416,079.11; and that the necessary assessment upon the stockholders to pay said indebtedness, including the expenses of the receivership, was 83.2 per cent. upon the capital stock of $500,000.

In addition to those filed to the original report, exceptions were filed to the supplemental report, objecting to the allowance of interest upon the claims of the creditors, and to the addition of twenty per cent. to the amount of the indebtedness, for the purpose of providing for the payment of the expenses of the receivership. All the exceptions to the master's reports were overruled, and a final decree was entered against the defendants according to its findings; a decree being entered against each stockholder defendant severally for the amount computed to be due from him upon the assessment of the stock ascertained to be standing in his name on the books of the bank at the date of its suspension, at the rate of assessment fixed in the report of the master. From this decree Alonzo Richmond, Charles Comstock, Thomas Lord, and William Henri Adams, administrator *de bonis non* of the estate of William H. Adams, deceased, severally appealed.

Mr. Henry G. Miller for appellant Richmond.

I. The bill, as amended in October, 1876, was an ordinary creditor's bill, and under it the court could only reach the assets of the bank for the benefit of the complainant and the judgment creditors of the bank who had been permitted by the court to prosecute as cocomplainants. As the statutory

liability of the stockholders was not to the bank, but to the creditors of the bank, and therefore not an asset of the bank, it could not be enforced in this proceeding, and the bill should have been dismissed at the hearing as to those of the stockholders who were not charged with holding the property of the bank received in exchange for stock. *Hicks* v. *Burns*, 38 N. H. 141; *Jacobson* v. *Allen*, 12 Fed. Rep. 454; *Story* v. *Furman*, 25 N. Y. 214; *Dutcher* v. *National Bank*, 12 Blatchford, 435; *Bristol* v. *Sanford*, 12 Blatchford, 341; *Pollard* v. *Bradley*, 20 Wall. 520; *Egberts* v. *Wood*, 3 Paige, 517;[1] *Fish* v. *Howland*, 1 Paige, 20; *Brown* v. *Ricketts*, 3 Johns. Ch. 553; *Walker* v. *Devereaux*, 4 Paige, 229; *Joy* v. *Wirtz*, 1 Wash. C. C. 417; *Whitney* v. *Mayo*, 15 Ill. 251; *Harper* v. *Union Mf'g Co.*, 100 Ill. 225; *Stedman* v. *Eveleth*, 6 Met. (Mass.) 114; *Knowlton* v. *Ackley*, 8 Cush. (Mass.) 93; *Gray* v. *Coffin*, 9 Cush. (Mass.) 192; *Chase* v. *Lord*, 77 N. Y. 1; *Hoard* v. *Wilcox*, 47 Penn. St. 51.

II. As the right to enforce the statutory liability of stockholders by a proceeding in chancery under the second section of the act of July 30, 1876, accrued to complainant and other creditors of the bank long after the original bill was filed, it could not be enforced under an amendment of the bill, but should have been made the subject matter of an original suit. *Shields* v. *Barrow*, 17 How. 130; *Pirich* v. *Anthony*, 10 Allen, 470; *Milner* v. *Milner*, 2 Edwd. Ch. 114; *Pilkington* v. *Wignall*, 2 Madd. 240, 244; *Pritchard* v. *Draper*, 1 Russ. & Myln. 191; *Mason* v. *Railroad Co.*, 10 Fed. Rep. 334; *Verplank* v. *Mercantile Ins. Co.*, 1 Edwd. Ch. 46; *Crabb* v. *Thomas*, 25 Ala. 212; *Conroy* v. *Smith*, 11 Geo. 539; *Fenno* v. *Coulter*, 14 Ark. 38; *Williams* v. *Starke*, 2 B. Mon. 196; *Platt* v. *Squire*, 5 Cush. (Mass.) 551; *Ryan* v. *Tallmadge*, 1 Johns. Ch. 184; *Belknap* v. *Stone*, 1 Allen, 572; *Sanborn* v. *Sanborn*, 7 Gray, 142.

III. The bill as amended was multifarious as charged by Richmond in his amended answer of July 23, 1883, and for that reason should have been dismissed. *Sexton* v. *Davis*, 18

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[1] *S. C.* 24 Am. Dec. 236.

Ves. 72; *Dimmock* v. *Bixby*, 20 Pick. 368; *Cambridge Water Works* v. *Somerville Dyeing Co.*, 14 Gray, 193; *Pope* v. *Leonard*, 115 Mass. 286; *Wiles* v. *Suydam*, 64 N. Y. 173.

IV. Nearly all the claims which the stockholders are by the final decree required to pay were as against the stockholders barred by the statute of limitations[1] long before they were presented, or any steps taken against the stockholders to enforce their payment, and this neglect to prosecute should be regarded as conclusive evidence of an abandonment by these creditors of their causes of action against the stockholders, if any existed. *Carol* v. *Green*, 92 U. S. 509; *Sugar River Bank* v. *Fairbank*, 49 N. H. 131; *Bank of the United States* v. *Daniel*, 12 Pet. 32; *Gilfillan* v. *Union Canal Co.*, 109 U. S. 401; *Allen* v. *Link*, 5 Lea, 454; *Christmas* v. *Mitchell*, 3 Iredell Eq. 535; *Miller* v. *McIntyre*, 6 Pet. 61; *Holmes* v. *Trout*, 7 Pet. 171; *Sicard* v. *Davis*, 6 Pet. 124; *Gorman* v. *Judge*, 27 Mich. 138; *Hubbell* v. *Warren*, 8 Allen, 173; *Neve* v. *Weston*, 3 Atk. 557; *Rogers* v. *King*, 8 Paige, 209; *Berrington* v. *Evans*, 1 You. & Coll. (Ex.) 434; *Sterndale* v. *Hankinson*, 1 Simons, 393.

V. Stockholders can only be required to pay the debts of the bank as they existed at the time it went into liquidation. *Fleckner* v. *Bank of the United States*, 8 Wheat. 338; *National Bank* v. *Atlas Bank*, 9 Met. (Mass.) 182; *United States* v. *Knox*, 102 U. S. 422; *Patterson* v. *Lynde*, 106 U. S. 519; *White* v. *Knox*, 111 U. S. 784; *Parker* v. *Macomber*, 18 Pick. 505; *Parrott* v. *Colby*, 6 Hun 55, affirmed 71 N. Y. 597; *Cherry* v. *Lamar*, 58 Geo. 541; *Branch* v. *Kraffi*, 61 Geo. 614; *Terry* v. *Anderson*, 95 U. S. 628; *Bassett* v. *Hotel Co.*, 47 Vt. 313.

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[1] The following is § 15 of the statute of Illinois entitled "Limitations," in force when this right of action accrued, and which is still in force: "Actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury to property real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

VI. The court erred in directing each stockholder to pay the amount assessed upon his stock to the receiver appointed by the court in the proceeding by creditors' bill, long before the stockholders were made parties defendant, and in including in such assessment the cost of the receivership. *Slee* v. *Bloom*, 20 Johns. 669; *Moss* v. *McCullough*, 5 Hill, 131; *Bonaffe* v. *Fowler*, 7 Paige, 576; *Pollard* v. *Bailey*, 20 Wall. 520; *Carol* v. *Green*, 92 U. S. 509.

VII. The court erred in including in the decree the sum of $149,686.98 for interest.

VIII. The court erred in overruling the exceptions, and each of them, to the master's reports, and in rendering a decree upon the master's supplementary report.

IX. The court erred in rendering a decree against appellant Comstock, as the owner of 150 shares of stock, whereas he was not liable in any view, to exceed 50 shares.

And herein also the court erred in setting aside transfers of stock in favor of creditors who did not attack the same until years after the statute of limitations had barred such attack.

Mr. H. B. Hurd for appellants cited the following cases not cited by *Mr. Miller* or by *Mr. Fuller*. (1) As to the statutory liability: *Burnham* v. *Wellensberg Coal Co.*, 47 Penn. St. 49; *Brown* v. *Eastern State Co.*, 134 Mass. 590; *O'Reilly* v. *Bard*, 105 Penn. St. 569; *Farnsworth* v. *Wood*, 91 N. Y. 308; *Wright* v. *McCormack*, 17 Ohio St. 86; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Hanson* v. *Donkersley*, 37 Mich. 184; *Powell* v. *Eldred*, 39 Mich. 552.

Mr. Melville W. Fuller for appellants:

I. The Circuit Court erred in allowing the amendment of July 23, 1883, by which it was attempted to turn a creditors' bill into an original bill for the enforcement of a statutory stock liability under the act of June 30, 1876. *Hatch* v. *Dana*, 101 U. S. 205; *Patterson* v. *Lynde*, 112 Ill. 196; *Terry* v. *Anderson*, 95 U. S. 628; *Walker* v. *Powers*, 104 U. S. 245; *Shields* v. *Barrow*, 17 How. 130; *Smith* v. *Woolfolk*, 115 U. S. 143.

Argument for Appellees.

II. The court erred in holding that the amended bill of October 5, 1876, was a supplemental bill, and, as such, sustainable under the act of Congress of June 30, 1876. *Milner* v. *Milner*, 2 Edwd. Ch. 114; *Pinch* v. *Anthony*, 10 Allen, 470.

III. The court erred in holding that the amended bill of October 5, 1876, was a bill on behalf of the complainant and all other creditors.

IV. The court erred in holding and proceeding to decree upon the theory that the statutory stock liability was part of the assets of the bank. *Irons* v. *Manufacturers' Bank*, 6 Bissell, 301; *Godfrey* v. *Terry*, 97 U. S. 171; *Terry* v. *Tubman*, 92 U. S. 156; *Carol* v. *Green*, 92 U. S. 509; *Jacobson* v. *Allen*, 12 Fed. Rep. 454; *Insurance Co.* v. *Bank*, 104 U. S. 54; *Pollard* v. *Bailey*, 20 Wall. 520.

V. The court erred in overruling the defence of the statute of limitations and in rendering a decree against the stockholders for an amount covering the entire alleged indebtedness of the bank with interest, when as to the largest part thereof the claims were barred by that statute. *Quayle* v. *Guild*, 91 Ill. 378; *Hancock* v. *Harper*, 86 Ill. 445; *Carol* v. *Green*, 92 U. S. 509; *Wright* v. *McCormack*, 17 Ohio St. 86; *Hewett* v. *Adams*, 50 Maine, 271; *Hawthorne* v. *Calef*, 2 Wall. 10. (2) As to the effect of going into liquidation: *Miller* v. *White*, 50 N. Y. 137; *McMahon* v. *Macy*, 51 N. Y. 155; *Laidley* v. *Kline*, 8 W. Va. 218; *Foster* v. *Crenshaw*, 3 Munf. 514; *Shields* v. *Anderson*, 3 Leigh, 789; *McDowell* v. *Goldsmith*, 24 Maryland, 214; *Trippe* v. *Huncheon*, 82 Ind. 307; *Larrabee* v. *Baldwin*, 35 Cal. 155; *Hastings* v. *Drew*, 76 N. Y. 9. As to the Statute of Limitations: *Abrahams* v. *Myers*, 40 Maryland, 499; *Hall* v. *Cresswell*, 12 G. & J. 36; *Perry* v. *Turner*, 55 Missouri, 418; *Umsted* v. *Buskirk*, 17 Ohio St. 113

Mr. D. J. Schuyler and *Mr. Edward G. Mason* for appellees cited:

To the point that the bill was properly amended to enforce stock liability and was not multifarious. *Ogden* v. *Thornton*, 30 N. J. Eq. 569; *Hill* v. *Filkin*, 2 P. Wms. 6; *Pollard*

v. *Bailey*, 20 Wall. 509; *Horner* v. *Henning*, 93 U. S. 228; *Patterson* v. *Lynde*, 112 Ill. 196; *Bank* v. *Kennedy*, 17 Wall. 19; *Casey* v. *Galli*, 92 U. S. 512; *Pennell* v. *Lamar Ins. Co.*, 73 Ill. 303; *Derrick* v. *Lamar Ins. Co.*, 74 Ill. 404; *Battle* v. *The Mutual Ins. Co.*, 10 Blatchford, 417; *Harper* v. *Union Mfg. Co.*, 100 Ill. 225; *Moore* v. *Reynolds*, 109 Mass. 473; *Atlas Bank* v. *Nahant Bank*, 23 Pick. 480; *Harvey* v. *Lord*, 10 Fed. Rep. 236; *Mix* v. *Beach*, 46 Ill. 311; *Planters' Bank* v. *Sharp*, 6 How. 301; *Bronson* v. *Kinzie*, 1 How. 316; *McDougald* v. *Dougherty*, 14 Geo. 674; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 139; *Hallett* v. *Davis*, 2 Paige, 15; *Thompson* v. *Brown*, 4 Johns. Ch. 619; *Morgan* v. *New York & Albany Railroad*, 10 Paige, 290.[1] That interest runs on debts of the bank: *Brown* v. *Lamb*, 6 Met. 203; *Atlas Bank* v. *Nahant Bank*, 3 Met. 581; *National Bank of the Commonwealth* v. *Mechanics' National Bank*, 94 U. S. 437. That the statute of liquidations was not a bar, and that the voluntary liquidation was a waiver of the statute: *Borders* v. *Murphy*, 78 Ill. 81; *Clements* v. *Moore*, 6 Wall. 299; *Scovill* v. *Thayer*, 105 U. S. 143; *Philippi* v. *Philippe*, 115 U. S. 151. That the stock transfers were invalid: *Sawyer* v. *Hoag*, 17 Wall. 610; *First National Bank* v. *Smith*, 65 Ill. 44; *Wheelock* v. *Kost*, 77 Ill. 296; *Brown* v. *Adams*, 5 Bissell, 181; *Hale* v. *Walker*, 31 Iowa, 344; *Bowden* v. *Farmers' Bank*, 1 Hughes, 307; *Adderly* v. *Storm*, 6 Hill, 624; *National Bank* v. *Case*, 99 U. S. 628; *Nathan* v. *Whitlock*, 9 Paige, 152; *Bowden* v. *Santos*, 1 Hughes, 158; *Wager* v. *Hall*, 16 Wall. 584; *Bowden* v. *Johnson*, 107 U. S. 251; *Whitney* v. *Butler*, 118 U. S. 655. That the expenses of the receivership should be assessed upon stockholders: *Irons* v. *Manufacturers' Bank*, 21 Fed. Rep. 197; *Morrison* v. *Price*, 23 Fed. Rep. 217. That the stock liability survives against the estate of a deceased shareholder: *New England Bank* v. *Stockholders*, 6 R. I. 154;[2] *Deming* v. *Bull*, 10 Conn. 409; *Davis* v. *Weed*, 44 Conn. 569, 581; *Boston Glass Manufactory* v. *Langdon*, 24 Pick. 49, 52;[3] *Russell* v. *McLellan*, 14 Pick. 63, 69; *Hutchins* v. *State Bank*, 12 Met. (Mass.) 421; *Grew* v. *Breed*, 10 Met. (Mass.) 569, 576.

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[1] *S. C.* 40 Am. Dec. 244. [2] *S. C.* 75 Am. Dec. 688. [3] *S. C.* 35 Am. Dec. 292.

Mr. James H. Roberts for the bankrupt Holmes.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

Some of the questions raised by the assignments of error are common to all the appellants, and others are peculiar to the individual cases. So far as necessary to the disposition of the case, they will be considered in their order.

The first assignment of error relates to the pleadings. It is objected that the court erred in permitting the complainant to file the amended bill of October 5, 1876, and also in permitting the amendment made at the hearing on July 23, 1883, and we are asked to reverse the decree on that account, and on remanding the cause to direct that the amended bill as amended be dismissed. The grounds of objection to the amendments as made are: 1st, that the amended bill stated a case entirely different from that contained in the original bill; and, 2d, that it made the bill as amended multifarious. The changes made in the case as originally stated in the bill are alleged to be: 1st, that it converted a creditor's bill, the object of which was to subject to the payment of the complainant's judgment assets of the corporation which could not be reached at law, into a bill for the additional purpose of enforcing the statutory liability of the stockholders of the bank to answer for its contracts, debts, and engagements; and, 2d, that it converted the bill filed by the complainant in his own right into a bill on behalf of himself and all other creditors of the corporation.

It is a mistake, however, to assume that the bill as originally filed was strictly and technically a creditor's bill merely, for the purpose of subjecting equitable assets to the payment of the complainant's judgment. That undoubtedly was a part of its purpose and prayer, and in pursuance of it a small amount of the assets of the bank was recovered by the receiver, converted into money, and applied to the payment of the costs in the cause, but the whole of this recovery amounted only to $3346.96, and it was not until after this result became manifest that application was made and leave given to file the

amended bill. But the main purpose of the bill as originally framed was to obtain a judicial administration of the affairs of the bank on the ground that its capital stock and property was a trust fund for the benefit of its creditors, the company being insolvent and in liquidation, and that under the management of its officers and directors this trust was being violated and perverted. The bill contained allegations that Holmes, the president and manager of the bank, had converted its assets to his own use and to the use of others, in violation of his trust and in fraud of creditors, applying the assets of the bank so as to prefer some creditors over others, and otherwise dissipating and squandering them. It accordingly prayed for a full discovery of all the transactions on the part of Holmes in reference to the affairs of the bank since its suspension, for an injunction prohibiting any further transfers of its assets, for the appointment of a receiver with the general powers of receivers in like cases, and for general relief.

If this bill had been prosecuted, as originally framed, to final decree, and had resulted in the recovery of assets of the bank applicable to its purposes, it would necessarily have been made to appear during the progress of the suit that there were other creditors of the bank equally entitled with the complainant to share in the fruits of the litigation. The relief that would have been granted in such circumstances would have been by means of a decree distributing the assets obtained, equally among all the creditors, including the complainant, who, in respect to such assets, would have been entitled to no priority, either by virtue of having reduced his claim to judgment or by reason of having first filed a bill to enforce the trust. In the case of an insolvent incorporation thus brought into liquidation, and wound up by judicial process at the suit of a creditor, whether he sues in his own right, or on behalf of himself and other creditors, the rule of distribution is the same, and is founded upon the principle of equality in which equity delights; unless a claimant or some other judgment creditor had, previously to the filing of the bill, obtained a lien at law upon some portion of the property distributed, or could establish a superior equity, existing at the

time of the filing of the bill. *Curran* v. *Arkansas*, 15 How. 304; *Wood* v. *Dummer*, 3 Mason, 308; *Ogilvie* v. *Knox Ins. Co.*, 22 How. 380, 387; *Sawyer* v. *Hoag*, 17 Wall. 610.

When the amended bill was filed, the resources of the bank, discovered and delivered to the receiver, had been exhausted. The amended bill set out the names of all the stockholders, and all of those claimed to have been stockholders at the date of the suspension by name, with the number of shares belonging to each. It charged that certain of them combined and confederated with the defendant Holmes for the purpose of committing a fraud upon the creditors of the bank, by surrendering and transferring their shares of stock, receiving in exchange therefor a portion of the assets of the bank applicable to the payment of its debts. It accordingly prays, as a part of the relief, that these transactions may be inquired into and set aside; that the assets of the bank so received by any of these stockholders may be decreed to be delivered up and applied to the payment of the debts of the bank; and that, in addition thereto, an account be taken of all the present indebtedness of the bank and of the amounts due from each of the defendants "to your orator and the judgment and other creditors of the said bank as stockholders thereof, upon the basis of the number of shares of stock held by them at the time the said bank suspended payment in the manner as aforesaid, in pursuance of the provisions of the act under which the said bank was organized, and by which the liability of the stockholders thereof is fixed and determined."

In some respects it is quite true that this amended bill is a departure from the case as stated in the original bill. It was, however, germane to the original bill to have included in it the statements of the amended bill in respect to such of the stockholders as were charged by name with having, in combination with the president of the company, sold their stock, receiving assets of the bank in payment therefor after it had gone into liquidation, or in contemplation of insolvency, and in fraud of the creditors. Assets of the bank received by any of them in such circumstances were such as were clearly within the purview of the bill as originally framed, and those

allegations were certainly the subject of a proper amendment. Having thus brought in a number of the stockholders properly as defendants, to subject them to a decree to account for assets of the bank received by them in breach of trust and in fraud of creditors, it does not seem inappropriate or foreign to the general purposes of the bill for the court, also having jurisdiction over them in behalf of the complainant, who, as we have seen, necessarily represented all creditors entitled to share in the results of the suit, to proceed also upon the basis of granting the additional and complete relief prayed against them as stockholders, requiring them to answer under the statute for all the contracts, debts, and engagements of the bank. But to do this made it necessary to bring in also all other stockholders of the bank within the reach of the process of the court, although they may not have been charged as participating in the alleged breaches of trust and frauds. The various matters, therefore, contained in the amended bill and the original bill were thus connected with each other in such a way as fairly to bring the question of granting leave to file the amended bill within the discretion of the court below. In reviewing the exercise of that discretion on this appeal, we should not feel justified in any case in reversing the action of the Circuit Court, if it appeared that the appellants were not put to any serious disadvantage or materially prejudiced thereby. The amendment made at the hearing, whereby the amended bill was changed so as to state that it was filed by the complainant on behalf of himself and all other creditors, we regard as purely formal and properly permitted for the purpose of making the bill explicitly to conform to all that had taken place previously in the progress of the cause. The litigation had been conducted, from the time of the filing of the first amended bill, upon the supposition and theory that it included in its scope all creditors of the bank alike. The defendants, therefore, could not have been taken by surprise by the amendment, and would not be deprived of the benefit of any defence or put to any disadvantage on account thereof.

The action of the Circuit Court in permitting these amendments we think is justified by the rules on that subject as

stated by this court in the case of *Neale* v. *Neales*, 9 Wall. 1; in *The Tremolo Patent*, 23 Wall. 518; and *Hardin* v. *Boyd*, 113 U. S. 756, 761. In the last mentioned case it was said (p. 761): "In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that, in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly great caution should be exercised when the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs."

By the original national banking act, § 5151 Rev. Stat., it was declared that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." By § 5220, it was also provided that "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock." But no provision is contained in the original act specifying what course may or shall be taken, in case of voluntary liquidation, to enforce the individual liability of the shareholders. It is provided by § 5234 that when the Comptroller of the Currency has become satisfied of the default of the association under §§ 5226 and 5227 to redeem any of its circulating notes, he may forthwith appoint a receiver, who, under his direction, shall take possession of the books, records, and assets of the association, collect all debts, dues, and claims belonging to it, "and may, if necessary to pay the debts of

such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

It thus appears that in the case of an involuntary liquidation under this section, the business of liquidation, as defined and required by the law, involved the appointment of the receiver, who should, in addition to the collection of the ordinary assets of the bank, also enforce against the stockholders their individual liability, so far as necessary to create a fund sufficient to pay all the debts of the association. It can hardly be supposed that the omission in the statute to provide an express and specific course of proceeding, by way of judicial remedy, in case of voluntary liquidation, left the creditors of such an association in such circumstances without remedy against either a deficiency of assets or the results of a fraudulent maladministration. Section 5151 imposes upon the shareholders of every national banking association an individual responsibility for all its contracts, debts, and engagements, and the terms in which the obligation is created are unconditional and unqualified, except that the liability shall be equal and ratable as among the shareholders.

As all the shareholders are bound in that way to all the creditors, any proceeding to enforce this liability must be such as from its nature would enable the court to ascertain for what the stockholders ought to be made liable, to whom, and in what proportion as respects each other. This can only be done by the methods and machinery of a court of equity. Besides this, it must, we think, be admitted that a court of equity would be entitled, upon the general principles of its jurisdiction, to entertain a bill by one or more creditors whose suit would necessarily be for the benefit of all, against the association and its officers and managers, and all those participating in its voluntary liquidation, for the purpose of preventing and redressing any maladministration or fraud against creditors, contemplated or executed. In the liquidation of such an association, those entrusted with its management

occupy the relation of trustees, first for creditors, and the terms of that trust, implied by law, require them to reduce the assets of the association to money or its equivalent, and to pay out those assets or their proceeds equally among creditors.

The omission in the original banking act of 1864 to provide expressly similar remedies in case of voluntary liquidation to those specified in case of involuntary liquidation was supplied by the act of June 30, 1876, 19 Stat. 63; Supplement to Rev. Stat. 216. The first section of that act provides for the appointment of a receiver by the Comptroller of the Currency, as provided in § 5234 of the Revised Statutes, whenever any national bank shall be dissolved and its charter forfeited as prescribed in § 5239 of the Revised Statutes, or whenever any creditor shall have obtained a judgment against it which has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of its insolvency after due examination. This receiver, it is declared, shall proceed to close up such association and enforce the personal liability of the shareholders. Section 2 of the act of June 30, 1876, is as follows: "That when any national banking association shall have gone into liquidation, under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders, provided for by section fifty-one hundred and fifty-one of said statutes, may be enforced by any creditor of such association by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established." This section was in force when the first amended bill was filed in October, 1876. Whether we regard it as merely declaratory of the law as it stood under the original banking act, or as giving a new remedy which could not have been resorted to before, we think it warranted the court below in permitting the complainant to file his first amended bill.

In the case of involuntary liquidation under the supervision

of the Comptroller of the Currency, the receiver appointed by him is authorized and required, not only to collect and apply the proper assets of the bank to the payment of its debts, but also, so far as may be necessary, to enforce the individual liability of the shareholders. It thus appears that the enforcement of this liability is a part of the liquidation of the affairs of the bank; at least, so closely connected with it as to constitute but one continuous transaction. When, in the case of voluntary liquidation, the proceeding is instituted by one or more creditors for the benefit of all, by means of the jurisdiction of a court of equity, there seems to be no reason why the nature of the proceeding should be considered as changed. The intention of Congress evidently was to provide ample and effective remedies in all the specified cases for the protection of the public and the payment of creditors, by the application of the assets of the bank and the enforcement of the liability of the stockholders. Admitting that this liability is not strictly an asset of the bank, because it could not be enforced for its benefit as a corporation nor in its name, yet it is treated as a means of creating a fund to be applied with and in aid of the assets of the bank towards the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are by the statute made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank. It was, therefore, proper to describe the bill to be filed by and on behalf of creditors as in the nature of a creditors' bill so as to enlarge the scope and purpose of a bill that might be more strictly limited as a creditors' bill merely.

We think, therefore, that if such a bill would have been objectionable without the statute, it is warranted by the statute. It is no objection that the original bill was filed prior to the passage of the act of June 30, 1876. The bill as amended, being authorized by the statute in force at the time the amendment was filed, would justify such a proceeding in a pending suit to which it was made germane by the statute itself, as well as an original bill then for the first time

filed. Neither do we consider the objection valid that it does not purport to have been filed in pursuance of the act of June 30, 1876, and is not filed by the complainant on behalf of all the creditors. The scope and prayer of the bill under the operation of the statute made it a bill for the benefit of all the creditors, notwithstanding it erroneously claimed priority on behalf of the complainant individually. The only proper decree that could have been rendered upon it would have been for the equal distribution of the fruits of the litigation among all the creditors of the bank who in the meantime had come in and proved their claims. The final amendment, as we have already seen, only had the effect to make the bill conform to the course of the proceeding which had actually been had under it, and was, therefore, purely formal. Its only effect was to make the bill profess to be what in law it was, and what in point of fact it had been considered to be.

Mr. Daniell, Chancery Practice, c. 5, § 1, p. 245, 4th ed. says: "The court will generally at the hearing allow a bill, which has originally been filed by one individual of a numerous class in his own right, to be amended so as to make such individual sue on behalf of himself and the rest of the class."

Our conclusion on this point is, that the court below committed no error in permitting the amendments complained of to be made.

The assignment of error next to be considered arises upon the defence made on behalf of the defendants below, of the statute of limitations. The limitation relied upon is that prescribed by an act of Illinois, which provides that "actions on unwritten contracts, express or implied, or on awards of arbitration, or to recover damages for an injury to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Pub. Laws Ill. 1871–2, 559, § 15; Hurd's Rev. Stat. Ill. 1881, 705.

It is not necessary to decide in this case whether the statute of Illinois relied upon, is applicable, because in the view which

we have already taken of the nature of the amended bill filed in October, 1876, the statute, if applicable, ceased to run against the creditors of the bank entitled to the benefit of the decree, at that date. That amended bill is to be considered from the date of its filing, as a bill on behalf of all the creditors of the bank who should come in under it and prove their claims. When any creditor appeared during the progress of the cause to set up and establish his claim, it was necessary for him to prove that at the time of filing the bill he was a creditor of the bank; any defence which existed at that time to his claim, either to diminish or defeat it, might be interposed either before the master or on the hearing to the court. The creditor, having established his claim, became entitled to the benefit of the proceeding as virtually a party complainant from the beginning, and the time that had elapsed from the filing of the bill to the proof of his claim would not be counted as a part of the time relied on to bar the creditor's right to sue the stockholders. In other words, if he proves himself to be a creditor with a valid claim against the bank, he becomes a complainant by relation to the time of the filing of the bill. This being so, it is not disputed that in October, 1876, the bar of the statute had not taken effect, even on the supposition that the statute applied.

In the case of *In Re General Rolling Stock Company, Joint Stock Discount Company's Claim*, L. R. 7 Ch. 646, Mellish, L. J., stated that in a case where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or in insolvency, or under a trust for creditors, or under a decree of the court of chancery in an administration suit, "the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

Mr. Daniell, 1 Chancery Practice, c. 15, par. 2, p. 643,

4th ed., states that "a decree for the payment of debts under a creditor's bill for the administration of assets is also considered as a trust for the benefit of creditors, and will in like manner prevent the statute from barring the demand of any creditor coming in under the decree; the creditor's demand, however, must not have been barred at the time when the suit was instituted: for if the creditor's demand would have been barred by the statute before the commencement of the bill the statute may be set up. It is to be remarked upon this point, that it has been held that it was the decree only which created the trust; and that the mere circumstance of the bill having been filed, although it might have been pending six years, would not take the case out of the statute; but, according to the later decisions, it seems that the filing of the bill will operate by itself to save the bar of the statute, though the plaintiff by delay in prosecuting the suit may disentitle himself to relief."

He also says, c. 29, par. 1, p. 1210: "It may be observed here that where a person, not a party to the suit, carries in a claim before the master under the decree, the party representing the estate out of which the claim is made has a right to the benefit of any defence which he could have made if a bill had been filed by the claimant in equity or an action had been brought at law to establish such claim. Therefore, as we have seen, an executor may in the master's office set up the Statute of Limitations as a bar to a claim by a creditor under the decree, provided such claim was within the operation of the statute before the decree was pronounced."

The authorities abundantly sustain the proposition also that a creditor who comes in under and takes the benefit of a decree is entitled to contest the validity of the claim of any other creditor, except that of the plaintiff whose claim is the foundation of the decree. 2 Daniell Ch. Pr. c. 29, § 1, p. 1210, n. 4, and cases cited.

In *Sterndale* v. *Hankinson*, 1 Simons, 393, decided in 1827, it was stated by Vice Chancellor Leach, that "every creditor has to a certain extent an inchoate interest in a suit instituted

by one on behalf of himself and the rest, and it would be attended with mischievous consequences to estates of deceased debtors if the court were to lay down a rule by which every creditor would be obliged either to file his bill or bring his action."

It is supposed by counsel for the appellants that the authority of this case is shaken by what was said by Jessel, M. R., in his decision of *In Re Greaves, deceased; Bray* v. *Tofield*, L. R. 18 Ch. Div. 551. It is true that in this case the Master of the Rolls said that creditors had better not rely upon that decision for the future, but he points out as the reason that at the time he was speaking — in 1881 — bills in equity had been abolished in England, and that wherever it is an action to recover a debt upon a contract the statute of James was binding upon the High Court in every case in which it applies, and that it was no longer the practice, so far as personal estate was concerned, to bring an action by one creditor on behalf of others, because of a provision in the act of 1852, since the passing of which the practice had been abandoned, of suing by one creditor on behalf of all, except in cases relating to real estate, as to which the section of the statute does not apply, unless it has been ordered to be sold or there is a trust or power of sale, and that, therefore, there were no longer any suits brought by any creditor, except for the payment of his own debt. In the present case, the suit, although in the nature of a creditor's bill, is not a bill merely for the administration of the assets of an insolvent corporation. There is no fund formerly belonging to the corporation in court for distribution. It is a suit for the enforcement of a personal liability of the defendant stockholders to pay the debts of the corporation, in which the creditors are the complainants. Each creditor becomes a party to the suit, it is true, only when he appears to prove his claim. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered

as a party complainant from the beginning by relation to the time of filing the bill. The beginning of the suit as between the creditor and the stockholder is the date of the filing of the bill, if during its progress and pendency he proves his right to be considered as a cocomplainant. It follows, therefore, that the statute sought to be applied in the present case ceased to run as against the complainants from the date when the bill was filed, in October, 1876, under which they subsequently established their right to come in as participants in the benefits of the decree. Whether or not the Statute of Limitations of Illinois would in any case operate to bar such a suit as the present, being a bill in equity in the Circuit Court of the United States, founded upon an obligation arising under an act of Congress, is a question which we are, therefore, not called upon to consider or decide.

Another assignment of error is peculiar to the appeal of the administrator *de bonis non* of William H. Adams, deceased. William H. Adams in his lifetime was one of the defendants in the amended bill of 1876, and at the time of the suspension of the bank a stockholder to the extent of 240 shares. He died June 6, 1882, during the pendency of the suit, which stands revived as against his administrator *de bonis non*. The administrator contended that the personal liability of his intestate did not survive as against the administrator, and that, therefore, no decree could be rendered against him subjecting the estate of Adams in his hands for administration. The judicial decisions more directly relied upon by the appellant in support of this contention are those of *Dane* v. *Dane Manufacturing Co.*, 14 Gray, 488; *Bacon* v. *Pomeroy*, 104 Mass. 577; *Ripley* v. *Sampson*, 10 Pick. 371; *Bangs* v. *Lincoln*, 10 Gray, 600; *Gray* v. *Coffin*, 9 Cush. (Mass.) 192. These cases, however, so far as they are in point, are based upon the particular language of the statutes of Massachusetts, materially differing from that contained in the national banking act. Under that act the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is volun-

tarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. *Flash* v. *Conn.*, 109 U. S. 371; *Hobart* v. *Johnson*, 19 Blatchford, 359. In Massachusetts it was held, in *Grew* v. *Breed*, 10 Met. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity.

The next assignment of error to be considered arises upon the separate appeal of Charles Comstock, who is charged by the decree with an assessment upon 150 shares of the capital stock of the bank standing in his name as owner at the time of its suspension. In his answer, which is under oath as called for, Comstock "admits that at the time of the said suspension he was the owner and holder of certain shares of capital stock thereof; that previous to — about in the year 1872 — he was the owner of one hundred and fifty shares of said stock; that on or about the 8th day of February, 1873, this defendant sold, assigned, and delivered fifty shares of the said stock to Ira Holmes, and on or about June, 1873, this defendant sold, assigned, and delivered fifty other shares of said stock to Preston C. Maynard; that he endeavored repeatedly to have said stock transferred on the books of the bank, but that said Maynard refused to allow said stock — so transferred, although he had before promised to have the same transferred. That at the time of the said several sales of stock as aforesaid, the said banking association was carrying on its regular business of banking, and was in fact solvent and fully able to pay its debts, and, as he is informed and believes, not indebted to any of the present creditors of said bank. That afterwards, on or about the 23d day of September, 1873,

this defendant sold, assigned, and delivered to the said Ira Holmes his other fifty shares of stock in said bank, with other property, receiving in payment therefor, and for the other property sold to said Holmes at the same time, certain promissory notes of one Wm. Patrick, payable to the said Ira Holmes, and was secured with certain other notes by mortgage from said Wm. Patrick to said Ira Holmes, which said notes and mortgage have proven to be of little value to this defendant, and in consequence of the incumbrances and taxes upon said property, and the expense of foreclosing, and how much of the value of said notes and security should be attributable to the consideration of this sale of said stock, this defendant is unable to state; but he insists that at the time of said sale to said Holmes this defendant was informed and believed said bank was able to pay all its debts in full, and the consideration received by him was paid by said Holmes out of his individual property, and not from the assets or property of said bank."

The stock books introduced on the part of the complainant show that fifty shares of this stock were transferred September 23, 1873; fifty more on September 24, 1873, and fifty more were cancelled on the last date; and the testimony of Holmes is that, as to the last fifty shares, they must have been transferred at the same time. The transfers in each case were to Ira Holmes. It is found by the decree of July 23, 1883, that the bank became insolvent and suspended payment September 23, 1873, and went into voluntary liquidation on September 26, 1873. The resolutions of the shareholders of the bank, instructing the directors to put the bank into voluntary liquidation, were passed at a meeting held on September 25, 1873. One of the resolutions is as follows: "That this bank, in its endeavors to continue business through the existing panic, has substantially exhausted its cash resources and is unable to continue cash payments, and that we regard it for the best interests of the stockholders and depositors alike that its affairs be placed in voluntary liquidation in accordance with the 42d section of the national currency act in that behalf provided." The directors, at a meet-

ing held on the same day, resolved to go into voluntary liquidation and close up the affairs of the bank in pursuance of this resolution. The notice to the public, addressed to the creditors of the bank, was issued and advertised the next day. As to the fifty shares of stock sold by Comstock to Holmes on September 23, 1873, we think the conclusion cannot be resisted that the transaction was made in contemplation of the insolvency of the bank, and, although both parties may have believed that the bank would ultimately be able to pay all of its debts, notwithstanding this transaction, we think that, as against creditors, it was fraudulent in law, and to that extent Comstock is chargeable as a shareholder. The sale of fifty shares in February, 1873, and of the other fifty shares in June, 1873, there is no reason to suppose were not made in entire good faith, and without any expectation on the part of the parties of the insolvency of the bank. Notwithstanding that, Comstock continued to be upon the books of the bank the owner of these shares until September 23 and September 24, when they were respectively transferred.

By § 5139 of the Revised Statutes, those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law. It follows, therefore, that Charles Comstock, in respect to the shares sold by him in February and June, 1873, was the statutory owner on the 23d day of September, 1873. His liability as such stockholder is the same as if he had that day sold and transferred the stock to Ira Holmes, but such a sale and transfer could only have been made that day by Comstock, who was himself a director, in contemplation and actual knowledge of the suspension of the bank; it would operate as a fraud on the creditors, an effect which the law will not permit. The case is not within the rule laid down in *Whitney* v. *Butler*, 118 U. S. 655. Here there is no proof, as there was in that case, of the delivery of the certificates to the bank

and a power of attorney authorizing its transfer, with a request to do so made at the time of the transaction. The delivery was to Holmes, not as president, but as vendee. We are, therefore, constrained to hold that the decree below, in charging Comstock with liability as the owner of 150 shares, was not erroneous.

The next assignment of error is based upon that part of the decree which directs payment of the claims reported by the master under the denomination of Class D, amounting in the aggregate to $185,119.34. They are designated by the master as claims "arising before the failure of the bank, upon which worthless collaterals were subsequently received." It is averred by the appellees that they are claims arising for the most part, if not in all instances, upon endorsements and guarantees made in the name of the bank by Holmes, its president, after the suspension of the bank, and while it was in liquidation. It appears clearly from the evidence that, in many cases, parties having claims against the bank accepted from Holmes commercial paper held by the bank which it had received in the course of its business, and which constituted a part of its assets, running some of it several months and some of it several years, bearing interest, some at the rate of eight and some at the rate of ten per cent. per annum, endorsed and guaranteed in the name of the bank by Holmes as president. The books of the bank show that in these cases the paper so received was charged against the account of the party receiving it, thus closing the account as settled. In these cases, it is testified by Holmes that the creditors gave their checks to the bank for the amount standing to their credit. In some cases, the creditors or their agents testifying to the transactions, without contradicting Holmes in respect to what was in fact done, nevertheless state that the paper accepted by them was received, not in payment, but as security. It is obvious, however, that in most, if not all instances, the witnesses are referring to the security which they supposed they had received and were entitled to rely upon, by means of the endorsement and guarantee of the paper thus received, made by Holmes as president in the name of the bank. They

certainly acted upon this belief, for in many instances they proceeded to obtain judgments against the bank, after the maturity and dishonor of the paper so received, upon these endorsements and guarantees, and in this proceeding proved their claims in that form by transcripts of such judgments. It is true that, in the final decree, the master was directed to correct his computation of interest so as to equalize the claims of the creditors by allowing interest at a uniform rate from the time of the suspension upon the amounts as they appeared to be due from the books of the bank, but all the claims in Class D, notwithstanding the settlements made, were included in the amounts found due and ordered to be paid. In this respect we are of the opinion that the decree is erroneous. Those creditors who made settlements after the bank was put into liquidation and received from the president in that settlement paper of the bank, or as in some cases the individual notes of Holmes himself, endorsed or guaranteed in the name of the bank, are not to be considered as creditors of the bank entitled to subject the stockholders to individual liability. The individual liability of the stockholders, as imposed by and expressed in the statute, is indeed for all the contracts, debts, and engagements of such association, but that must be restricted in its meaning to such contracts, debts, and engagements as have been duly contracted in the ordinary course of its business. That business ceased when the bank went into liquidation; after that there was no authority on the part of the officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. No such express authority appears in this case, and the power of the president or other officer of the bank to bind it by transactions after it was put into liquidation is that which results by implication from the duty to wind up and close its affairs. That duty consists in the collection and reduction to money of the assets of the bank, and the payment of creditors equally and ratably so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and

other assets of the bank in *specie*, and the title to such paper may be transferred by the president or cashier by an endorsement suitable to the purpose in the name of the bank, but such endorsement and use of the name of the bank is in liquidation and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a liability, contract, or engagement of the bank for which they can be held to be individually responsible. Every creditor of the bank, receiving its assets under such circumstances, knows the fact of liquidation, and is chargeable with knowledge of its consequences; he takes the assets received at his own peril; he is dealing with officers of the bank only for the purpose of winding up its affairs. If he accepts something in lieu of an existing obligation looking to future payment it must be from other parties. It is not within the power of the officers of the bank, without express authority, by such means to prolong indefinitely an obligation on the part of the shareholders, which is imposed by the statute only as a means of securing the payment of debts by an insolvent bank when it is no longer able to continue business, and for the purpose of effectually winding up its affairs. This is the very meaning of the word "liquidation." Mr. Justice Story said, in *Fleckner* v. *Bank of the United States*, 8 Wheat. 338, 362: "Its ordinary sense, as given by lexicographers, is to clear away, to lessen debt, and, in common parlance, especially among merchants, to liquidate the balance is to pay it." In *White* v. *Knox*, 111 U. S. 784, 787, it was said: "The business of the bank must stop when insolvency is declared." In *National Bank* v. *Insurance Co.*, 104 U. S. 54, the liquidation of such an association was said to be like that which follows the dissolution of a copartnership.

In this view, it is contended, on behalf of the creditors interested, that, as they relied upon the continuing liability of the bank and of its shareholders, by virtue of these endorsements and guarantees, if they are deprived of the benefit of the latter, the settlements themselves should be set aside, and they, the creditors, restored to the situation in which they

were at the time of the suspension of the bank. But this is clearly inadmissible; such a restoration cannot in fact be made. The circumstances of the situation have greatly changed by the lapse of time. The creditors who entered into these settlements have no ground of complaint against the bank as a corporation or as against its stockholders; they were not misled to their hurt by any fraudulent misrepresentations or concealments of any matters of fact. Whatever mistake was made was their own, and it was a mistake consisting merely in a misapprehension of their legal rights. They were bound to know, as well as Holmes, the limits of his authority, and ought to have acted on the presumption that he had no right to bind the bank or its shareholders *in futuro* by any new engagement. If they chose, in their eagerness to obtain a settlement in advance of other creditors equally entitled, to accept a part of the assets of the bank or the personal obligation of its president in settlement of their claims, they must abide by the election which was then made, and which cannot now be set aside. They made their settlements in view of their own estimate of the present advantage; they cannot now undo them to the disadvantage of other creditors, over whom they sought to obtain preferences, nor to the prejudice of the stockholders, who have a right to be exonerated from the payment of all contracts, debts, and engagements of the bank contracted since the date of its suspension.

In respect to these claims in Class D, Ira Holmes, the president, testified as follows:

"Q. In each case where you settled with the creditor of the bank and turned him out bills receivable of the bank, how was that settlement — was it a payment, or what was the transaction? A. It was a full payment of the demand. He gave me his check on the bank for the amount, the same as if we were doing a regular business and the parties should come in and buy so much bills receivable and give me a check on another bank.

"Q. Was there any case in which there was any other understanding than that he took these bills receivable in payment of his demand against the bank? A. Not any."

On his cross-examination he is asked:

"Q. If creditors agree to take paper in full payment, why would the bank guarantee it? A. I didn't say they agreed to take it in full; a great many people took the paper without guarantee, and others would not take it unless they had a guarantee; only when it got down to the last settlement, and they would not take it unless the bank would guarantee it."

The force of this testimony is, we think, that the party accepted the paper, with or without the guarantee, in settlement of the claim as it stood on the books of the bank on the day of the suspension. Those who insisted upon the guarantee or endorsement by the bank undoubtedly relied upon it as an obligation which they might thereafter enforce, but their reliance was upon that contract and not upon the original claim. It does not detract from the binding nature of the settlement that this guarantee was given and received and relied upon. The only mistake now asserted as a ground for going behind the settlement is, that the guarantee or endorsement is not effective as an obligation of the bank for which the stockholders are individually responsible. But this is not a mistake as to what the parties intended to do; it is only a mistake as to the effect of what they did. As the bank was in liquidation, and the officers were not authorized to enter into new contracts, the presumption is, in every case where the creditor accepted paper in settlement of his claim, that it was received in payment and operated as a satisfaction. If there was any other agreement by which that paper was received merely as collateral to the original debt and received as security and not in payment, it must be affirmatively shown.

We have carefully examined all the evidence contained in the record in respect to each of the claims embraced in Class D of the master's report. We are not able to find as to any one claim, that it is an exception from the general rule as to settlements established by the testimony of Holmes. In several instances, it is true that the witnesses with whom the settlements were made alleged that the notes with the endorsements or guarantees were not taken in payment and satisfaction, but as additional security for their claims; and that the

transactions were made upon the faith that the remedy against the bank and against its stockholders was not thereby impaired. But it is quite evident, we think, that in each of these cases the reliance was not upon the liability arising upon the claim as it stood prior to the settlement, but upon the endorsement or guaranty of the bank, and the belief that the liability of the stockholders remained unaffected by the transaction. The facts in each case are, that the claim as it stood upon the books of the bank was settled between the parties by the creditor accepting bills receivable out of the assets of the bank, or the individual note of its president endorsed or guaranteed in the name of the bank; supposing that, in the event of default in payment by the other parties to the paper, the obligation of the bank itself was preserved by the endorsement or guaranty, and that for that contract the stockholders continued to be liable. Upon this view of the facts, the stockholders are by law exonerated from the obligation to contribute to the payment of any claims of this class. All those enumerated in Class D in the master's report, therefore, should have been excluded from the benefits of the decree.

Three other questions raised upon the record remain to be disposed of. The first is whether interest upon the debts of the bank should be allowed as against the stockholders from the date of the suspension. As the liability of the shareholder is for the contracts, debts, and engagements of the bank, we see no reason to deny to the creditor as against the shareholder the same right to recover interest which, according to the nature of the contract or debt, would exist as against the bank itself; of course, not in excess of the maximum liability as fixed by the statute. In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts then due as against the shareholders to the time of payment.

The next question arises upon the objection of the appellants

to the allowance made by the decree of twenty per cent. of the amount of the debts of the bank due at the date of the suspension, in addition thereto, to cover the expenses of the receivership. This sum, we think, ought not to have been allowed. The ordinary costs of the cause are, of course, taxable as against the defendants as in other cases, but we see no reason why the stockholders should be required to contribute, as a debt due from the bank or themselves, to a fund for the payment of the expenses of the receivership. The receiver in this case was appointed under the original bill, before any claim was set up on behalf of the complainant and the other creditors against the stockholders upon their individual liability. The purpose for which the receiver was appointed was to collect the proper assets of the bank and reduce them to money, so that they might be applied to the payment of its creditors. This office he performed, and the fund so realized may be and was properly charged with the expenses of its collection, but the receiver was not necessary to the enforcement of the liability of the stockholders in this suit. That liability was in progress of enforcement by the creditors themselves. Nothing was necessary to that end except the ordinary procedure by means of a master to ascertain what amount of debts was due, to what creditors, with the names of the stockholders who were such on the books of the bank at the date of its suspension, and the number of shares held by each. The case differs in this respect from that of an involuntary liquidation under the supervision of the Comptroller of the Currency. The receiver appointed by him is the only person authorized to enforce the liability of the stockholders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. The equivalent for them, in the case of creditors who upon the voluntary liquidation of the bank seek to enforce

the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause. No receiver is necessary in ordinary cases, and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond any allowance made heretofore and paid, if any, should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.

It is also objected to the decree that it included among the claims directed to be paid out of the assessment upon the shareholders an amount, alleged to be about $5000, in behalf of persons assumed to be creditors, but who did not appear in the cause or before the master to file and prove their claims. This was erroneous. No person is entitled to recover as a creditor who does not come forward to present his claim. The only proof in reference to such claims in the present case consisted in affidavits made by Henry B. Mason, one of the attorneys of the receiver, that he had "made a personal investigation of all the claims against the Manufacturers' National Bank, and, from the evidence introduced in the cause, and from outside knowledge confirmatory thereof, states that the Manufacturers' National Bank of Chicago is justly indebted to the several persons mentioned in the schedule hereunto annexed and made part of this affidavit, in the principal sums set opposite their several names, with interest thereon from March 12, 1875, at the rate of six per cent. per annum in each case," &c. No one appeared as claimant, and no authority is shown to any one to act for him or in his own name. These claims should have been disallowed.

The decree of the Circuit Court is accordingly reversed, and the cause is remanded, with directions to proceed therein as justice and equity may require, in conformity with this opinion; and it is so ordered.

Counsel for Parties.

MERCHANTS' INSURANCE COMPANY *v.* ALLEN.

MERCHANTS' INSURANCE COMPANY *v.* WEEKS.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Argued March 17, 18, 1887. — Decided March 28, 1887.

While a vessel was in transit on a voyage from Liverpool to New Orleans, its home port, a policy was taken out, "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea," these words being written in the printed blank, and the insurers knowing the home port of the vessel. The policy also contained in print the words — "Warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan, nor anchorage thereof during the continuance of this insurance." The vessel completed the voyage to New Orleans, went thence to Ship Island for a return cargo to Liverpool, and was lost from peril of the sea in the Gulf of Mexico, on the way from Ship Island to Liverpool. *Held*, that there was no conflict between the written and the printed parts of the policy; that the insurers contemplated that the vessel would navigate the Gulf of Mexico, except the designated ports, and that the policy covered the vessel at the time of the loss.

The ultimate disputed fact to be established in a suit in admiralty upon a marine policy of insurance being the seaworthiness or unseaworthiness of the vessel, it was no error in the Circuit Court at the trial to refuse to find the evidence from which this ultimate fact was deduced.

The court discountenances attempts by counsel in preparing bills of exception in admiralty causes to have the cause retried here on the evidence.

An over-insurance of cargo is not a breach of warranty by the owner of the vessel not to insure his interest in the vessel beyond a stipulated amount: and the over-insurance in this case, if any, does not tend to establish fraud in the loss of the vessel.

Whether, since the act of February 16, 1875, new testimony can be taken after an appeal in admiralty to this court, or amendments to the pleadings allowed, is not decided.

THESE were appeals from decrees in admiralty. The case is stated in the opinion of the court.

Mr. Joseph P. Hornor for appellant. *Mr. Charles W. Hornor* was with him on the brief.

Mr. J. R. Beckwith for appellee Allen.

Mr. Richard H. Browne for appellee Weeks. *Mr. Charles B. Singleton* was with him on the brief.

Mr. Chief Justice Waite delivered the opinion of the Court.

These appeals present the same questions, and may be considered together. The suits were brought on two policies of insurance, one insuring the interest of George D. Allen and the other that of Silas Weeks, in the ship Orient, from April 15, 1882, to April 15, 1883, "to navigate the Atlantic Ocean between Europe and America, and to be covered in port and at sea." At the time the policy was issued the ship was on the Atlantic Ocean, bound on a voyage from Liverpool, England, to New Orleans, Louisiana, laden with a general cargo. The company knew of this when it executed and delivered the policy, and insured the vessel lost or not lost. New Orleans was the home port of the ship, and there the home office of the company was situated. All parties knew that the ship was sailing to and from that port. The policy also contained this clause:

"Warranted by the assured not to use port or ports in Eastern Mexico, Texas, nor Yucatan, nor anchorage thereof, during the continuance of this insurance, nor ports in West India Islands between July 15th and October 15th; nor ports on the northeast coast of Great Britain beyond the Thames, nor ports on the continent of Europe, north of Antwerp, between November 1st and March 1st."

This warranty is part of the printed portion of the policy, but the portion describing what the insurance covered is in writing.

The ship arrived safely in New Orleans on her voyage from Liverpool, and, after unloading, proceeded to Ship Island, where she took on a cargo of timber for Liverpool, and while on her voyage to that port she was struck by a cyclone about one hundred miles out in the Gulf of Mexico and wrecked.

The first question presented by the appellants is whether the insurance covered the ship while in the Gulf of Mexico. This depends on the meaning of the language of the policy.

construed in the light of the circumstances which surrounded the parties at the time of its execution. The evident purpose was to insure a New Orleans ship engaged in the Atlantic trade between Europe and America for a year, both at sea and in port. At the time the insurance was effected she was on a voyage between Liverpool and New Orleans, and all parties knew that the business in which she was engaged took her in and out of the last named port. That was her home port, and that was where the insurance company had its own office. That the navigation of the Gulf was contemplated during the life of the policy is shown by the fact that certain of its ports were excluded from the risks the company assumed. This fairly implies that all others might be used, and as the ship was to be insured all the time during the year if she was employed in navigating the Atlantic between Europe and America, whether at sea or in port, it is evident the parties intended to cover her by the policy while sailing from port to port in that general trade. New Orleans is a leading American port in that trade. To get to and from it ships must navigate the Gulf of Mexico.

No one can doubt that the policy would cover at all times during the year a voyage to all the ports of Great Britain except those northeast of the Thames, and to all ports on the continent of Europe north of the Mediterranean as far as Antwerp, and elsewhere on the northern coast between March and November. Yet in doing so the ship would have to sail in waters other than those of the Atlantic Ocean. Taking the whole policy together, we cannot doubt it was the intention of the company to cover the ship while engaged in the Atlantic trade between ports in Europe and America other than those specially warranted against. Whether this would include ports east of Gibraltar it is unnecessary now to decide.

It is true that, if there is a conflict between the written words of a policy and those that are printed, the writing will prevail, but, if possible, the writing and the print are to be construed so that both can stand. Here we think it clear that the written clauses, when construed in connection with those

that are in print, have the effect of describing the trade in which the vessel was to be employed rather than confining her navigation exclusively to the waters of the Atlantic Ocean. If it were otherwise, while the ship would be insured in port and on the ocean, she would be uninsured while performing that part of her voyage from the ocean to the port and from the port to the ocean. Such a condition of things will never be presumed in the absence of the most convincing proof to the contrary.

We have no hesitation in deciding that the insurance covered the ship at the time of her loss.

This disposes of all the questions which arise on the finding of facts.

The principal controversy in the case was as to the seaworthiness of the vessel. The court has found as a fact that she was seaworthy when she left Liverpool on the voyage during which the policies were issued, and also when she sailed from Ship Island on the voyage in which she was lost. To these questions the testimony was largely directed, and it was to some extent conflicting. At the trial the court was asked to find as follows:

"The ship Orient, prior to her departure on her last voyage, on 1st August, 1882, was run aground on Ship Island bar, where she remained for three days and two nights in bad and squally weather, 'rolling and pounding heavily,' and while on the bar, and after coming off, drew and continued to draw four inches of water per hour until the final wreck, and that when she was thrown upon her beam ends by the force of the storm she was prevented from righting herself by the large amount of water which had leaked into her hold, and hence the cutting away of her masts was of no avail, and the said leak was the direct cause of her loss, and she was unseaworthy when she started on her last voyage;" and "that when the ship Orient was hauled off the bar at Ship Island where she had been aground as aforesaid, she leaked four inches of water per hour, and said leak did not diminish from said time, 3d August, 1882, until 5th September, 1882, when she went to sea on her last voyage, nor until she was finally

wrecked, and said leak could have been discovered only by unloading said vessel and taking her to New Orleans and putting her in the dry-dock, which was not done, and no other precaution was taken to ascertain whether said vessel was injured by having been aground, or to ascertain the leak or leaks, save by a cursory examination of her bottom by a diver, without taking her out of the water;" and "that the ship Orient was knowingly sent to sea by the assured in an unseaworthy state and in an unfit condition, which necessarily increased the danger which led to her loss."

This was refused, and an exception taken. To present the question of the propriety of that refusal to this court, a bill of exceptions was prepared, containing the entire evidence in the cause, which was signed by the circuit judge with the remark that "this bill is claimed by the respondent under the authority of *The Francis Wright*, 105 U. S. 381, considering which case the court does not feel at liberty to deny the bill."

In the case of *The Francis Wright* it was ruled, p. 387, and, as we are satisfied, correctly, "that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other, on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case, a refusal to find would be equivalent to a ruling that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none." "But," it was added, "this rule does not apply to mere incidental facts which only amount to evidence bearing on the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends."

In the present case, the ultimate fact to be proved was the seaworthiness of the vessel. That ultimate fact has been found. What the company wanted to have incorporated in the findings were the "mere incidental facts" which only amounted to evidence from which the material fact of seaworthiness or unseaworthiness was to be ascertained. This was properly refused.

Another bill of exceptions was taken, because the court made the following findings, when there was no evidence whatever to support them:

"Fourth. That when said risk was taken by the said defendant and said policy executed and delivered the said ship Orient was on the Atlantic Ocean, bound on a voyage from the port of Liverpool to the port of New Orleans, in the United States, laden with a general cargo; that the defendant at the time of the execution and delivery of the policy of insurance was well aware of that fact, and had notice and knowledge that the said vessel was prosecuting said voyage, bound to the port of New Orleans, and insured the vessel, lost or not lost.

"Fifth. That the port of New Orleans was the home port of the said Orient and was the domicil of the underwriting company, and that all parties knew that the ship was sailing to and from that port, and when the policy sued on was issued it was the intention of the assured and the underwriters that the said policy was to cover risks while said ship was navigating the Gulf of Mexico, except excluded ports."

"Twenty-first. That at the time said ship Orient was wrecked and destroyed she was under the protection of said policy of insurance, and was lost and wrecked by a peril of the sea insured against."

So far from there being no evidence to support these findings, the record is full of facts from which the conclusions reached by the court might be drawn. The apparent purpose of counsel in preparing the bills of exceptions was to have the whole case retried here on all the evidence. That this cannot be done, since the act of 1875, has long been settled. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 U. S. 214; *The Adriatic*, 103 U. S. 730; *The Annie Lindsley*, 104 U. S. 187.

Opinion of the Court.

The case as tried below is reported as *Baker* v. *Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 916, where the discussion upon the effect of the evidence will be found.

It only remains to consider an application which has been made in this court for leave to amend the pleadings and introduce new testimony. At an early day in the present term leave was granted the appellants on their motion to take additional testimony. Under this leave depositions have been taken which are now on file. Their purpose is to show an over-insurance by the owners of the vessel on the cargo, which was also owned by them in whole or in part. The pleadings, as they stood in the court below, present no issue to which such testimony is applicable, and the appellants now ask leave to amend their answers so as to let it in.

Without determining whether, since the act of February 16, 1875, "to facilitate the disposition of cases in the Supreme Court, and for other purposes," (c. 77, 18 Stat. 315,) new testimony can, under any circumstances, be taken after an appeal in admiralty to this court, or amendments to the pleadings allowed, and, if so, what would be the proper practice to give effect to an application for that purpose, we deny this motion. An over-insurance of the cargo is not a breach of a warranty by the owner of the vessel not to insure his interest in the vessel beyond a certain amount, and the new testimony, standing by itself, fails to make out such a case of over-insurance on the cargo as would tend to establish a fraudulent loss of the vessel. The over-insurance of the cargo, if any there was, grew out of an insurance by Baring Brothers & Co., in London, for their protection as acceptors of drafts drawn by the captain on them to meet disbursements in the purchase of the timber which composed the cargo; at least that is the fair inference from the testimony.

The decree in each of the cases is affirmed.

FIRST NATIONAL BANK OF CLEVELAND *v.* SHEDD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Submitted January 24, 1887. — Decided March 28, 1887.

In two suits for the foreclosure of two mortgages of an insolvent railway, which had, by amendments and crossbills, become practically consolidated, the two sets of trustees, acting in harmony and in good faith, and with the approbation of the holders of a majority of the bonds issued under each mortgage (but against the wishes and objections of persons holding a minority of one of the issues as collateral, and contesting the priority of lien as to some of the property and the legality of some of the issues of bonds), procured the entry of a decree which ordered a speedy sale of all the property covered by either or both mortgages, as being for the best interest of all concerned, but left the conflicting claims as to the priority of lien and the amount of bonds issued to be settled by a subsequent decree or decrees. *Held*, that the court below had power to make this decree; that it was a final decree from which an appeal could be taken to this court; and that it was right.

THIS was a motion to dismiss, united with a motion to affirm. The case is stated in the opinion of the court.

Mr. Francis Rawle, *Mr. D. T. Watson* and *Mr. George T. Bispham* for the motion.

Mr. John Dalzell and *Mr. R. B. Murray* opposing.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

The facts on which these motions rest are as follows: The Shenango and Allegheny Valley Railroad Company is a corporation organized under a charter granted by the state of Pennsylvania to build and operate a railroad from a point of intersection or junction with the Erie and Pittsburgh Railroad, in the township of West Salem, in the county of Mercer, to Bear creek, in the county of Butler. In March, 1869, the directors of the company resolved to issue bonds to the

amount of $1,000,000, and secure them by a mortgage or deed of trust to Henry Rawle, trustee, on that portion of its road "constructed and to be constructed between the western terminus thereof at its junction with the Erie and Pittsburgh Railroad in West Salem township, Mercer county, and a point in Butler county forty miles southeastwardly from said western terminus, and to be denominated a first mortgage." Under this authority a mortgage or trust deed was actually executed to Rawle, as trustee, not only on this forty miles of road, with its rolling-stock and appurtenances, but also upon "any lateral or branch roads, with their appurtenances, that may hereafter be constructed by or come into possession of the company along the line of the afore mentioned forty miles of main line or connected therewith; all of which things are hereby declared to be appurtenances and fixtures of the said railroad, and also all franchises connected with or relating to the said railroad, or the construction, maintenance, or use thereof, now held or hereafter acquired by the said party of the first part [the company], and all corporate and other franchises which are now or may be hereafter possessed or exercised by the" company. This mortgage was duly recorded, and all the bonds authorized were issued thereunder.

By an act of the legislature of Pennsylvania, approved April 14, 1870, the company was authorized "to so extend their eastern terminus as to connect with the Allegheny Valley Railroad, and to so extend the western terminus as to connect with any other railroad;" and by another act, approved March 7, 1872, "to construct three branches from their railroad as may be necessary and convenient for the development and transportation of coal, ore, limestone, and other minerals in the vicinity of their railroad, provided the said branches shall not exceed a distance of ten miles from the main line of said company."

The main line of the road was afterwards extended from its eastern terminus to the Allegheny Valley Railroad on the east side of the Allegheny River, and from its western end to the Atlantic and Great Western Railroad near the town of Greenville, making the entire length of that line forty-seven

miles. The company also built sundry branch roads, and on the first of July, 1877, it executed another mortgage or deed of trust to John H. Devereux, trustee, to secure another proposed issue of $1,000,000 of bonds. This mortgage covered "the entire railroad, built and to be built, . . . from its junction with the Atlantic and Great Western Railroad . . . to the Allegheny Valley Railroad on the east side of the Allegheny River, together with all its branches, extensions, side tracks, switches, and turn-outs, built and to be built, and also all the lands, rights, franchises, and appurtenances thereto belonging, . . . and also all the corporate rights and franchises of said railroad company;" but it was expressly made "subject to a previous mortgage on forty miles of the northwestern end of the railroad aforesaid and its appurtenances executed to Henry Rawle, trustee."

Under this mortgage $200,000 of bonds were issued, and $175,000 in addition were placed with the following parties as collateral security for the following sums:

1. First National Bank of Cleveland, O. . .	$64,000	to secure	$30,000
2. Second National Bank of Erie, Pa. . . .	60,000	„	35,000
3. First National Bank of Greenville . . .	22,000	„	20,000
4. Mahoning Nat. Bank of Youngstown . .	16,000	„	10,000
5. Wick Brothers & Company	5,000	„	2,500
6. Thomas H. Wells	8,000	„	5,000
In all — bonds	$175,000	to secure	$102,500

On the 15th of March, 1884, Charles L. Young and Henry Tyler, subjects of Great Britain, claiming to be the owners of the $200,000 of bonds issued under the Devereux mortgage, filed their bill against the Railroad Company in the Circuit Court of the United States for the Western District of Pennsylvania to have a receiver appointed. This was done on the same day the bill was filed, by the appointment of Thomas P. Flower receiver, and he was at once authorized to borrow $100,000 upon his certificates, to be used in the payment of wages, interest, taxes and other preferred claims.

On the 1st of May, 1884, Devereux, as trustee under the second mortgage, filed his bill against the company in the same court, to foreclose his mortgage and asking the appoint-

ment of a receiver. To this the company filed an answer, June 26, 1885, substantially admitting all the averments in the bill, and setting forth the appointment of Flower as receiver in the suit of Young & Tyler.

On the 6th of June, 1885, Rawle filed a petition in the suit of Young & Tyler, asking permission to sell under his mortgage, but on the 31st of July, 1885, the court, although of opinion that "an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of its creditors," postponed the order asked for until a sale could be made under both mortgages, by the two trustees acting conjointly.

On the 5th of September, 1885, Devereux, by leave of the court, filed an amended bill, to which, in addition to the railroad company, he made Rawle, trustee, Flower, the receiver, The British and South Wales Railway Wagon Company (Limited), The Union Rolling Stock Company (Limited), and William A. Adams, defendants. In this amended bill it is averred that the Devereux mortgage is a first lien on all the main line of the company excepting only "forty miles of said main line extending southeasterly from its junction with the Erie and Pittsburg railroad at Shenango," and "upon all the lateral branches of said road." The whole line, including the lateral branches, is stated to be seventy-five miles in length, and the part on which the Devereux mortgage is the first lien thirty-five miles. The prayer is for an account of the amount due on the bonds outstanding secured by the mortgages to Devereux and Rawle respectively, the amount due on the receiver's certificates issued by Flower, the expenses of the receivership, and certain car trust contracts, and also for a determination of the respective priorities of all the incumbrances and charges on the property, and for a sale of the mortgaged promises, free of liens, to pay the amounts found due in the order of their priority. This bill also prays the appointment of a receiver to take charge of the property and manage the business during the pendency of the suit. The British and South Wales Railway Wagon Company, The Union Rolling Stock Company, and William A. Adams answered, setting up certain car trust contracts which are imma-

terial on the present appeal. Devereux, the trustee, having died pending the suit, John M. Shedd was duly appointed in his place and substituted for him as complainant, April 16, 1886.

On the 18th of May, 1886, The First National Bank of Cleveland, The Second National Bank of Erie, The First National Bank of Greenville, The Mahoning National Bank, Wicks Brothers and Company, and Thomas H. Wells appeared in court, and on the 10th of June, 1886, were permitted to intervene in the suit, *pro interesse suo*, because of averments in their petition, that Shedd, the substituted trustee, "is committed to a course, and is acting in a manner which is calculated to injure them in their security, in this, to wit, that there is on foot a certain scheme for the reorganization of said railroad company, which contemplates a 'united and friendly foreclosure' and sale of the entire road under the two mortgages named in plaintiff's amended bill, and this action now pending is to be used as the means of carrying forward said reorganization scheme in connection with certain proceedings to be instituted upon the mortgage, in which Henry Rawle is named as trustee, and mentioned in plaintiff's said bill; that there are certain questions as to the extent of the lien of the said Rawle mortgage, and the number of the bonds outstanding, and the amount that is due thereon, which should be determined in this action, and which the petitioners are informed and believe that the said Shedd, trustee, does not intend to raise, and which, petitioners are informed and believe, if raised, will be determined against the validity and amount of a large portion of said bonds, but if left to the claim of the holders thereof and their trustee would amount to over one million dollars, ($1,000,000,) and be made a charge and lien upon said premises superior to that of the bonds held by the petitioners, and there are also disputes as to the extent of the liens of the two mortgages, the said Rawle claiming a first lien upon the entire road, and the petitioners claiming that it is only a lien upon forty (40) miles of the main line, and that theirs is a first lien upon the entire balance. That petitioners are informed and believe that it is a part of said scheme to which said Shedd,

trustee, is committed to have the interest in said railroad covered by the conveyance to Devereux sold without a determination of these questions, and by so doing the petitioners say that the value of their security will be greatly diminished, first, by not being able to know the exact extent thereof; and, secondly, by being unable, by reason of the uncertainties existing as to the extent of their lien, to protect the property from being sacrificed upon sale, and as to these matters they beg leave of the court to refer for a fuller statement of the same to their pleadings allowed by the court to be filed in case No. 17, in equity, May term, 1884," the Young & Tyler suit.

On the 12th of June, 1886, Rawle filed a cross-bill, in which, after setting up the mortgage in his favor and the default of the company in the payment of interest on the bonds secured thereby, he asked to be permitted to sell the mortgage property free of all liens, and to bring the proceeds into court, to be distributed in accordance with the respective liens and priorities of the parties.

On the 18th of June, 1886, the railroad company answered both the amended and cross-bills, and, leaving the parties to litigate among themselves as to their respective rights under the mortgages, joined in the prayers that the property might be sold.

On the 26th of June each of the intervenors filed an answer to the cross-bill of Rawle, setting up their respective claims and insisting that the lien of his mortgage should be confined to the forty miles of main line included in the resolution of the company authorizing its execution. It is also insisted that the amount actually due upon the outstanding bonds is much less than $1,000,000, for reasons which are specially stated, and "that owing to the disputes existing as to the amount of the first-mortgage bonds outstanding, and the extent of the lien thereof, and the dispute as to the extent of the lien of the second-mortgage bonds, and as disputes have arisen as to the amount and validity of the receiver's certificates, it is necessary, in order to protect its rights as a lien creditor, to have a court of competent jurisdiction to determine the amount of said bonds outstanding, and the amount due thereon and the

extent of the lien thereof, as well as the amount and the extent of the lien of said second-mortgage bonds, as well as the amount and validity of the said certificates before a sale of the said property."

"And the respondent respectfully represents, that, if the property of the defendant company is sold before the validity and extent of said liens are judicially determined, bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed at said sale.

"Wherefore your respondent prays that an accounting may be had and taken in the premises, that the amount of the bonds outstanding in the hands of *bona fide* holders for value may be determined; that the extent of the lien of each may be judicially determined, and upon the final determination of the matters, and not before that an order of sale may be issued to sell the mortgaged premises, and for such other and further relief as may be just and equitable in the premises and to your honors shall seem meet."

After these answers were in, both Shedd and Rawle, the trustees, moved the court for leave to sell the mortgaged property under their deeds of trust, and upon these motions, on the 13th of July, the district judge, sitting in the Circuit Court, filed an opinion, in which the circuit judge concurred, as follows:

"When this case was formerly before us, upon the petition of Henry Rawle, trustee, for leave to sell the Shenango and Allegheny Railroad under the power of sale in the mortgage to him, we expressed the opinion that an early sale of the railroad as an entirety would undoubtedly conduce to the benefit of all its creditors. This opinion is greatly strengthened by what has since transpired. Under the operation of the receivership the financial condition of the company is constantly growing worse, and it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale. In this view the creditors generally concur. The controlling objection to the sale as formerly proposed has been removed by the joint application of the trustees under

the two mortgages to sell by virtue of the powers of sale conferred upon them respectively, they agreeing to unite in the sale so as to assure to the purchaser an undoubted title to the whole property, and to so conduct the sale as to secure the highest price attainable.

"We have no hesitation in finding in the case of the Devereux-Shedd mortgage that there has been a default in the payment of interest coupons for more than eighteen months, and that by the election of one-tenth in amount of the bondholders the principal of the bonded indebtedness has become due and payable, and that by reason thereof the trustee is entitled to foreclose the mortgage or exercise his power of sale.

"The sale by the trustee will be under the control and subject to the approval of the court, and we can see to it that no unfair advantage is taken of the minority of the bondholders by reason of any improper combination among the majority or otherwise.

"The court having reached the conclusion that the mortgage trustees should be permitted to exercise their powers of sale under the direction of the court, it is to be hoped that the parties can speedily agree as to the manner in which the property shall be offered to sale; but if they do not agree we will hear them further upon that point before a decree is framed."

Pursuant to this decision a decree was entered on the 14th of October, as follows:

"This cause came on to be heard . . . upon a motion by and on behalf of the said John M. Shedd, trustee, and also by and on behalf of the said Henry Rawle, trustee, that the court shall order and decree a sale of all and singular the property, real, personal, and mixed, of the Shenango and Allegheny Railroad Company, freed and discharged from all liens and incumbrances whatsoever; and also upon a motion made by and on behalf of the said John M. Shedd, trustee; and also by and on behalf of the said Henry Rawle, trustee, to the effect that each trustee shall be authorized and empowered under and in accordance with the terms of his mortgage

to proceed and sell all and singular the property, real, personal, and mixed, covered by or included within his said recited mortgage, and upon a motion by and on behalf of both trustees for a sale of the entire property of the defendant company as incumbered and unable to pay the liens upon it, and so that the proceeds thereof may be distributed among the creditors entitled thereto. Due notice having been given to all parties in interest of these motions, and that the same would be heard, and the same having been already heard, all the parties in interest appearing by counsel and taking part in the argument, and the various papers and proceedings and record in the case of *Young et al.* v. *The Shenango and Allegheny Railroad Company* now pending at No. 17, May term, 1884, of this court, as well as also all papers, affidavits, and other proceedings in this case and other documents, were produced, heard, and considered by the court in support of the said motions, and the court, after consideration, being of the opinion that it was to be the best interest of all parties concerned that the said railroad and all the property of the Shenango and Allegheny Railroad Company should be sold as speedily as possible; and having filed an opinion to that effect, and the parties in interest being unable to agree upon the form of a decree directing said sale, and the court having fixed the 30th day of September, A.D. 1886, for settling the form of a decree, and counsel for all the respective parties having appeared and having been duly heard, and the court having considered the premises, do now order, adjudge, and decree, as follows:"

Then follows a detailed statement of all the property of the company, describing particularly its main line and branches, and also its lands, rolling-stock, and other property. There is then a finding of the execution of the two mortgages to Rawle and Devereux, the amount of bonds originally issued thereunder, and a default in the payment of interest such as would entitle the several trustees to take possession and sell under the powers vested in them respectively, and an adjudication that the trustees are severally "entitled to proceed and foreclose the said mortgage." It is also found that the mortgages

are each valid and existing liens on so much of the property "as was thereby lawfully conveyed to the said respective trustees, and which thereafter became vested in the said trustees respectively as after-acquired property, according to the terms of said mortgages, or either of them;" that all of the original issue of bonds under the Rawle mortgage was outstanding, with interest coupons attached, from October 1, 1884, and under the Devereux, $375,000 and all the interest warrants from their date, but there is no finding of the amount actually due on either of the issues. It is also found that there are $155,849.87 of receiver's certificates outstanding on which interest is payable at the rate of six per cent. per annum from their respective dates, and that these, "together with the costs, charges, and lawful expenses in this cause, and the costs, charges, expenses of the liabilities of the receivership, including the costs in the case of *Young* v. *The Shenango and Allegheny Valley Railroad Company* in this court, and all just and proper compensation, expenses, and allowances to the said receiver and the trustees under the said mortgages, and to any of the parties to the said cause, are entitled to be paid out of the proceeds of the . . . . sale in the first instance," and in preference to the bondholders.

The decree then proceeds as follows:

"(8) And this court does further find, adjudge, and decree that all the property, real, personal, and mixed, of the said Shenango and Allegheny Railroad Company is subject to the lien of either the said mortgage to the said Henry Rawle, trustee, or to the said mortgage to the said John H. Devereux, trustee, as also to the outstanding receiver's certificates, and that there are conflicting claims in reference to the priority of liens and their extent, and that there are conflicting claims between the said mortgagees and some of the bondholders in reference to the number of bonds legally outstanding and unpaid under the said respective mortgages to the said Henry Rawle, trustee, and to the said John H. Devereux, trustee, and, also, that there are conflicting claims in reference to the amounts of money due on the said respective bonds outstanding under the said mortgages which the holders thereof are

entitled to receive; and this court also finds that the Shenango and Allegheny Railroad Company is insolvent, and that it would be to the best interests of all parties concerned that the said property, real, personal and mixed, of the said defendant company should be sold; and it appearing to the said court that such sale by this court of the said property is prayed for under the amended bill filed by the said John M. Shedd, trustee, and also in the cross-bill filed by the said Henry Rawle, trustee, this court do now, upon motion of the solicitors for the said John M. Shedd, trustee, and also upon motion of the solicitors of the said Henry Rawle, trustee, the solicitors for the company and the receiver acquiescing herein, do now order, adjudge and decree that the said Henry Rawle and John M. Shedd be, and they are hereby, appointed special commissioners by this court to make sale of all and singular the property, real, personal, and mixed, including the franchises of the said Shenango and Allegheny Railroad Company; said sale shall be on the 25th day of January, 1887, at Shenango, the junction of the Shenango and Allegheny Railroad with the Atlantic and Great Western, now New York, Pennsylvania and Ohio Railroad, near Greenville, Mercy County, Pennsylvania, at twelve (12) o'clock noon, and it shall be at public auction, and the sale shall be made to the highest and best bidder, and report thereof made to this court."

It is then ordered that the whole property be sold as an entirety, at not less than $625,000, and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, &c., and the conclusion is as follows:

"13th. All disputes and controversies between the two mortgage trustees, the said Rawle and the said Shedd, or the bondholders under the said two mortgages, touching the extent of the lien of the said mortgages, respectively, or the priority of the lien of the said mortgages, respectively, as well as all questions concerning and touching the amounts due bondholders, respectively, under the said two mortgages, are hereby expressly reserved for future consideration and determination unaffected by anything in this decree."

Opinion of the Court.

From this decree the intervenors alone have appealed, and that appeal Shedd and Rawle move to dismiss because it was "taken from an interlocutory decree or order of sale and not a final decree." With this motion is also united a motion to affirm under Rule 6, § 5.

The motion to dismiss is overruled, but the motion to affirm is granted. The appeal in its present form brings up for review the single question of the propriety of ordering a sale before the rights of the parties under the several mortgages have been fully ascertained and determined. All parties, including the mortgage trustees, are satisfied, except these appellants, who have been allowed to intervene *pro interesse suo*, and who represent but a small minority of the mortgage indebtedness. The only substantial issues presented by their answers relate to the extent of the priority of the lien of the Rawle mortgage, and the amount due on that issue of bonds. They do not deny that the property must in the end be sold under the mortgages, and, while insisting that Rawle can only enforce his lien to the extent of the past due interest on that issue of bonds, there is no offer to provide means for the payment of that interest, and there is no pretence that the part of the property covered by his mortgage, whatever it may be, can be sold to advantage otherwise than as an entirety. Neither is it claimed that the property covered by the Devereux mortgage alone can be sold separate from the rest as advantageously as if the whole road and its branches were offered together. The entire opposition to a sale now rests on the claim that it is necessary, in order to protect the rights of these intervenors as lien creditors, that all disputed questions should be settled, or "bidding will be deterred on account of the risk and uncertainty, and the property will be in great danger of being sacrificed."

Against this is the fact that both the trustees agree in the opinion that the interests of their respective beneficiaries will be best subserved by an immediate sale, in which the creditors generally concur. In addition to this, the court finds, and the evidence shows, that the financial condition of the company under the administration of the receiver is continually grow-

ing worse. The receiver's certificates have increased since March 15, 1884, when the first loan was authorized, from $100,000 to nearly $156,000 in October, 1886, and the receiver, in his answers, says, that from his knowledge "of the condition of said railroad company and its property and finances, he verily believes it would be for the best interest of all parties concerned, including the stockholders, bondholders, and creditors, . . . that all its property should be sold as soon as possible, and in such manner as to give the purchasers thereof an unincumbered title thereto." This also was the opinion of the court when Rawle made his application in the suit of Young & Tyler for leave to sell, and which was then denied because the trustee of the Devereux mortgage did not unite in the application, and the court was satisfied that a fragmentary sale would operate injuriously upon the rights of all who were interested in securing the largest price for the property to be sold.

Against all this we do not find a word of evidence in the record, so that the only question is whether the law requires that a sale should be postponed against the wishes of the mortgage trustees and a large majority of the bondholders, simply because these intervenors, representing a minority interest, object. As a rule the trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust to which they are not actually parties. There is here no evidence to show fraud or unfairness on the part of the trustees. The company is satisfied with what they are doing, and so are all the bondholders under the Rawle mortgage, and a majority of those under that to Devereux. As was said in *Shaw* v. *Railroad Company*, 100 U. S. 605, 612: "Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." Here

the majority want an immediate sale. In this the trustees both agree, as does the railroad company itself. There is no evidence whatever of a want of good faith in any one. The court below, having the practical workings of the receivership under its own eye, did not hesitate to say that "it is now entirely clear that the best interests of all parties concerned will be promoted by a speedy sale," and we see nothing to the contrary.

Of the power of the court to make such an order in a proper case we have no doubt. The property is in the possession of the court and is depreciating in value by the accumulation of receiver's indebtedness, while the litigation between the parties as to their respective interests in it is going on. There cannot be a doubt that the whole ought to be sold together. If in the end it shall be found that the Rawle mortgage covers only a part, it will be as easy to fix the rule for dividing the proceeds equitably between the two securities after a sale as before, and there is nothing in the decree as entered to interfere in any way with such a distribution.

Upon the facts as presented to us we are entirely satisfied that the decree of the court below was right, and it is consequently affirmed.

The motion to dismiss is overruled and the decree affirmed.

CARPER *v.* FITZGERALD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Argued March 18, 1887. — Decided March 28, 1887.

No appeal lies to this court from an order of a Circuit Judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of *habeas corpus*

An order of the Circuit Judge of the Fourth Circuit, made at Baltimore, Maryland, that a prisoner brought before him there from Richmond, Virginia, on a writ of *habeas corpus*, shall be discharged, is a proceeding before him as a judge and not as sitting as a court; and it is not con-

verted into a proceeding of the latter kind by a further order that the papers in the case be filed in the Circuit Court of the United States at Richmond, and the order of discharge be recorded in that court.
Rule 34, 117 U. S. 708, explained.

THIS was an appeal from an order discharging a prisoner on a writ of *habeas corpus*. The case is stated in the opinion of the court.

Mr. R. A. Ayres, Attorney General of Virginia for appellant.

Mr. D. H. Chamberlain and *Mr. Bradley T. Johnston* for appellee. *Mr. William L. Royall* filed a brief for same.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This was a proceeding before the Circuit Judge for the Fourth Circuit at his Chambers in Baltimore, Maryland, for the discharge of Richard L. Fitzgerald from the custody of H. A. Carper, jailer of Pulaski County, Virginia, under a mittimus from John H. Cecil, a justice of the peace of that county. The petition was presented to the judge in Baltimore, who directed the clerk of the Circuit Court for the Eastern District of Virginia to issue a writ of *habeas corpus*, and make it returnable before him at the United States court-house in Baltimore. The writ was accordingly issued, under the seal of the court, in the usual form of circuit court writs, and made returnable "before the Honorable Hugh L. Bond, judge of our Circuit Court of the United States for the Eastern District of Virginia, sitting at the United States court-house in Baltimore, Maryland." The record shows that the jailer made his return to the writ, and that the petitioner filed a demurrer thereto, upon consideration of which an order of discharge was entered. At the foot of this order was the following:

"And it is ordered that the papers in this case be filed in the Circuit Court of the United States at Richmond, Virginia, and that this order be recorded in said court.

"HUGH L. BOND, *Circuit Judge.*"

Syllabus.

From this order the jailer was allowed an appeal to this court by the circuit judge, and the case was docketed here as "an appeal from the Circuit Court of the United States for the Eastern District of Virginia." The form of the docket entry here does not change the character of the proceeding from which the appeal was taken, and that was clearly under § 752 of the Revised Statutes, before the judge sitting as a judge, and not as a court. The act of March 3, 1885, c. 353, 23 Stat. 437, gives an appeal to this court in *habeas corpus* cases only from the final decision of a circuit court.

The order of the judge that the papers be filed, and his order recorded in the circuit court, does not make his decision as judge a decision of the court. Neither does our Rule 34, 117 U. S. 708, adopted at the last term, have that effect. The purpose of that rule was to regulate proceedings on appeals under § 763, from the decision of a judge to the circuit court of the district, as well as under § 764, as amended by the act of March 3, 1885, from a circuit court to this court. Power to make such a regulation was given to this court by § 765 of the Revised Statutes.

Appeal dismissed.

UNITED STATES *v.* McDOUGALL'S ADMINISTRATOR.

APPEAL FROM THE COURT OF CLAIMS.

Submitted January 7, 1887.—Decided March 28, 1887.

The fact that Congress, by several special acts, has made provision for the payment of several claims, part of a class of claims upon which the respective claimants could not have recovered in an action in the Court of Claims in the exercise of its general jurisdiction, furnishes no reason for holding the United States liable in an action in that court for the recovery of such a claim which Congress has made no provision for.

The fact that the Court of Claims has rendered judgment against the United States at various times upon claims of a particular class, from which judgments the Executive Department of the Government took no appeal, furnishes no reason why judgment should be given against the

Statement of Facts.

United States in an action in the Court of Claims on another claim of the class, if the United States are not otherwise liable therefor.

No statute of the United States, either in express terms or by implication, authorized the Executive in holding treaties with the Indians to make contracts of the character sued on in this action.

No officer of the government is authorized to so bind the United States by contracts for the subsistence of Indians not based upon appropriations made by Congress, that a judgment may be given against them in the Court of Claims in the exercise of its general jurisdiction; and this rule is not affected by the fact that the United States were greatly benefited by the contracts.

No opinion is expressed upon the point whether a claim presented to an Executive Department, after the expiration of the period within which it would have been cognizable by the Court of Claims, (had suit been brought thereon without first filing it in the Department), and by the Department referred to the Court of Claims under the provisions of Rev. Stat. § 1063, is barred by the statute regulating the limitation of suits in that court.

This was an appeal from a judgment rendered by the Court of Claims against the United States in favor of the appellee as administrator of the estate of George McDougall, deceased. The Court of Claims made the following finding of facts:

I. This claim has been pending in the Interior Department and before Congress for many years, but has never been finally disposed of.

II. Under the act of September 28, 1850 (9 Stat. 519), Redick McKee, George W. Barbour, and Oliver M. Wozencraft were duly appointed agents for the Indian tribes within the State of California. On October 9, 1850, Oliver M. Wozencraft, George W. Barbour, and Redick McKee were appointed commissioners "to hold treaties with the various Indian tribes in the State of California," as authorized by the act of 30th September, 1850. Upon the passage of the act February 27, 1851 (9 Stat. 586), they were informed that their offices and functions as commissioners were abrogated and annulled. They were at the same time directed not to suspend negotiations, but to enter upon their appointments as agents, and were as such designated under the act of 1851, to negotiate with the Indians of California, under the instructions already given.

The instructions referred to did not extend to and embrace

contracts for the subsistence of the Indian tribes, but only authorized such commissioners to hold treaties with such Indians.

III. Among the instructions given the said commissioners, under date of October 15, 1850, were the following:

"As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper.

"On the arrival of Mr. McKee and Mr. Barbour in California they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and after obtaining whatever light may be within its reach, will determine upon some rule of action most efficient in attaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties, binding on them, towards the government and each other. You will be able to judge whether it is best for you to act in a body or separately in different parts of the Indian country."

Again on May 9, 1851, the Commissioner of Indian Affairs wrote to the commissioners, using the following words:

"What particular negotiations may be required it is impossible for this office to foresee; nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately intrusted."

IV. When the commissioners arrived in California they found open hostilities existing between the Indians and the whites, and a general war had been agreed upon by the Indians. The governor of California had, at the request of Adam Johnston, the Indian agent, called out a portion of the militia of the state, and had organized a military force to operate against the Indians. To avoid the threatened, and quell the actual, hostilities, the commissioners at once began

to negotiate treaties with the Indians, by which they were required to leave their mountain resorts, to abandon their lands to the whites, to descend to the plains, and reside peaceably upon a tract of land selected for them. In return the commissioners promised the Indians that the United States would give them seeds to plant and implements to work with; establish schools, and appoint persons to teach them how to cultivate their lands and provide for their own wants.

V. The policy adopted by the commissioners included the "subsistence" of the Indians, and large quantities of beef and other provisions were stipulated for in the various treaties, and the office was notified that the same policy would have to be pursued throughout the whole state, and that this system was thought much better than the system of annuities. The letters in which these statements were made were written on May 1, 1851, and May 13, 1851.

On June 27, 1851, the Indian Office wrote to the commissioners, suggesting to them "that when the appropriation of $25,000 for holding treaties was exhausted, they should close their negotiations and proceed with the discharge of their duties as agents simply, as the Department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress."

On the 16th July, 1851, the office wrote to Barbour, one of the commissioners, saying: "In the copies of treaties made with the several Indian tribes heretofore transmitted to this office there are provisions for delivering them sundry articles in 1851, which cannot be complied with, as Congress will not be in session in time to make the necessary appropriations. Should you conclude other treaties, you will fix the time and payments, under any stipulation, at a period sufficiently in the future to allow of Congressional action to meet the requisitions;" and on the 9th July, 1851, the office wrote to Wozencraft, speaking of the "treaties you have concluded or may hereafter negotiate," and directing him to transmit in every case the estimate of money that will be required, &c. On August 9, 1851, after the Indian Office had notified the commissioners that the "appropriation for holding treaties," was exhausted,

the commissioner wrote to Redick McKee acknowledging the receipt of the joint letter of the commissioners, in which they stated that the policy of furnishing "subsistence must be pursued throughout the whole state;" and in this letter of acknowledgment he made no complaint and gave no advice or instruction to the contrary. And on September 15, 1851, he wrote to Wozencraft acknowledging copies of treaties "and return of expenditures, contracts, and disbursements."

On May 17, 1852, the Indian Office wrote Agents McKee and Wozencraft saying: ". . . I have therefore to request that, at the earliest practicable period, you make a full and detailed report directly to this office of all contracts, debts, and liabilities made and incurred by the agents of the Department in California."

Agent Wozencraft negotiated over one hundred treaties.

No disapproval or complaint of the actions of the commissioners, agents, or sub-agents, who were connected with the foregoing transactions, either by the President, Secretary of the Interior, or Commissioner of Indian Affairs, appears.

The agent, Wozencraft, without specific instructions so to do, made and entered into the following articles of agreement with the late George McDougall, who died May 14, 1872, and whose administrator now brings this suit: —

> Articles of agreement entered into this fifth day of April, A.D. eighteen hundred and fifty-two, between O. M. Wozencraft, United States Indian agent for California, of the first part, and George McDougall of San Francisco, of the second part.
>
> The said party of the first part agrees to contract with the party of the second part for two thousand and five hundred head of cattle, to be delivered as follows, viz., one thousand head to be delivered to Stephen Hutchinson, United States Indian trader, resident at San Gorgonia, for the Cohaulla tribe of Indians; five hundred head to be delivered to J. T. Ruckle, United States Indian trader, resident at Tamacula, and one thousand head to be delivered to the Indians at Aqua Callienti, near Womer's Ranche.

In consideration for which the party of the first part is to pay the party of the second part at the rate of twelve and one-half (12½) cents per pound (weight net), the weight to be estimated and agreed upon between the United States Indian traders and the party of the second part.

It is further understood that if there should be no appropriation by Congress this present session for the payment of this contract, then the parties of the second part are to receive fifteen and one-half cents per pound.

It is also further understood that one-half of the cattle contracted for may be "torones," at the option of the party of the second part; and it is further understood the cattle are to average five hundred pounds in weight each, if not, the weight to be made up by additional cattle, so that the original estimate may be complete.

It is further understood that the delivery of the cattle is to commence on the first of May next ensuing.

San Francisco, April 5, 1852.

O. M. WOZENCRAFT, [SEAL.]
U. S. Indian Agent.
GEORGE McDOUGALL, [SEAL.]

Witness:
J. T. RUCKLE.

VII. In pursuance of this contract this decedent delivered to J. S. Ruckle and Stephen Hutchinson, United States Indian traders, one thousand head of cattle, averaging 650 pounds each, and took from them the following receipt:

LOS ANGELES, *May* 17, 1852.

Received of George McDougall, the contracting party for supplying the "Cow-we-ha," "San Louis," and "Dieganian" tribes of Indians with beef cattle, one thousand head of cattle, averaging six hundred and fifty pounds weight each.

J. S. RUCKLE,
United States Indian Trader for the "San Louis" Indians and "Dieganians."
STEPHEN HUTCHINSON,
United States Indian Trader for the "Cow-we-has" Tribe of Indians.

Statement of Facts.

The parties to whom the property was delivered were those nominated in the contract, and were licensed United States Indian traders, and the weight of the beef was agreed upon by the parties designated by the contracting parties, viz., McDougall and Ruckle & Hutchinson. It was customary, at this time, to estimate the weight of cattle, and not to sell them by actual weight.

The price for beef at that time is shown to have been frequently as high as twenty cents per pound, by wholesale.

VIII. Claims similar to the one at bar have been paid by the United States government as follows: John C. Fremont (10 Stats. p. 804), $183,025, with interest at ten per centum per annum from June 1, 1851; Samuel J. Hensley (12 Stat. p. 847), $96,576; Samuel Norris, $69,900 (2 C. Cls. 155); Fremont's case, $13,333.33 (2 C. Cls. 461); Fremont & Roache's case (4 C. Cls. 252), $46,666; Belt's case (15 C. Cls. 92), $10,715.19.

The drafts upon which Samuel Hensley recovered were drawn by Wozencraft upon the Secretary of the Interior, and were dated February 11, 1852, and the agreement under which the said drafts were drawn was dated February 10, 1852. The contract with Samuel Norris was made by same party on December 31, 1851. The contracts upon which Belt & Co. recovered were entered into between Belt and Subagent Johnston at various times from August 5, 1851, to January 31, 1852, and on August 12, 1851, the Interior Department approved "of the motive which prompted him (Agent Johnston) to furnish additional subsistence to the Indians," and informed him that an appropriation would be made.

Wozencraft reported the amount of the government's indebtedness to McDougall as amounting to $101,500.

IX. The Indians who were dispossessed of their lands under these treaty stipulations ceased their warfare and ever after remained peaceable, but never recovered possession of their lands, although the treaties were not ratified by the Senate, but the United States assumed title to said lands and disposed of them in the same manner as other portions of the public domain have been disposed of.

Mr. Attorney General and *Mr. Heber J. May* for appellant.

Mr. James W. Denver and *Mr. John Paul Jones* for appellee.

Mr. Justice Harlan delivered the opinion of the court.

The only question discussed by counsel is as to the liability of the United States, under the written agreement between McDougall and Wozencraft of April 5, 1852, for the cattle delivered by the former. The argument in support of the judgment below proceeds mainly, if not altogether, upon the ground that the allowance by special acts of Congress of claims similar to the one here in suit, in connection with the failure or refusal of the proper officers to prosecute appeals from judgments in the Court of Claims against the United States upon contracts like the one in suit, constitute a sufficient basis, in law, for a recovery in this case.

Tracing the history of the claims referred to, we find that, by an act approved July 29, 1854, the Secretary of the Treasury was directed, out of any money not otherwise appropriated, to pay to John C. Fremont the sum of one hundred and eighty-three thousand eight hundred and twenty-five dollars, with interest at the rate of ten per cent. per annum from June 1, 1853, "in full of his account for beef delivered to Commissioner Barbour for the use of the Indians of California in 1851 and 1852." 10 Stat. 804.

In Hensley's case the Court of Claims delivered an opinion, which was transmitted to Congress February 2, 1850. H. R., 35th Cong., 2d Sess., R. C. Cls. No. 189. It is immaterial to the present inquiry that that court had no power at that time to give a judgment for money against the United States; for, if it had been then invested with all the jurisdiction it now has, the government would have succeeded. Its conclusion, upon the whole case, was that "the United States are not legally liable upon the contract claimed upon, because it was not made by their authority." At the same time the court disposed of McDougall's case — involving the identical claim presented in

this case — and held, upon the grounds stated in Hensley's suit, that the United States came under no legal liability to McDougall by reason of his agreement with Wozencraft, or of anything done under it. Congress, nevertheless, made provision, by special act of June 9, 1860, to pay Hensley's claim, 12 Stat. 847, but failed or refused to make an appropriation to pay McDougall.

Norris also sued upon a similar contract; but, for the reasons given in Hensley's case, his claim was also rejected. Congress, however, by joint resolution of June 22, 1866, referred that claim back to the Court of Claims "for examination *and allowance*," and directed "that in fixing the amount to be paid the claimant, the rule shall be the actual value of the supplies furnished at the times and places of delivery, of which due proof shall be made by the claimant." 14 Stat. 608. In obedience to that resolution, and not because of any change of opinion in the court as to the legal rights of Norris under his written agreement with Wozencraft, the Court of Claims gave judgment against the United States, at its December Term, 1866, for $69,900. *Norris* v. *United States*, 2 C. Cl. 155.

Subsequently, in *Fremont* v. *United States*, 2 C. Cl. 461, judgment was given against the United States upon one of this class of claims. That judgment did not proceed upon the ground that the claimant was entitled to recover if the case stood on the contract there in question — a contract similar to McDougall's — but upon the ground that the foregoing acts of Congress constituted a clear and distinct legislative recognition of the obligation of the United States to pay the fair value of the subsistence furnished for the Indians, as well under the contracts with Fremont, Hensley, and Norris, as under similar contracts with other parties. This decision was followed in *Fremont, &c.*, v. *United States*, 4 C. Cl. 252. Finally, in *Belt* v. *United States*, 15 C. Cl. 92, 106, upon a review of the circumstances connected with this class of claims, the court below adjudged that the United States were in law liable for the value of the subsistence furnished to Indians in California under the ageement there in suit, and which was similar to the

one of April 5, 1852, with McDougall. In none of the cases, in which judgments were rendered against the United States, were appeals prosecuted to this court.

The judgment in the present case was not accompanied by an opinion of the court below, for the reason, perhaps, that the claim of McDougall's administrator is covered by the decision in Belt's case. After a careful examination of the opinion in the latter case we are unable to find any solid ground upon which to hold the United States legally liable upon the agreement between Wozencraft and McDougall, or for the value of the cattle delivered under it. That Congress, by special acts, made provision for the payment of particular claims of the same class furnishes no ground whatever for the assumption that the government recognized its legal liability for the amount of such claims, much less for the amount of all other claims of like character. Such legislation may well furnish the basis for an appeal to the legislative department of the government to place all claimants, of the same class, upon an equality. But we are aware of no principle of law that would justify a court in treating the allowance by Congress of particular claims as a recognition by the government of its liability upon every demand of like character in the hands of claimants. We may properly take judicial notice of the fact that many claims against the United States cannot be enforced by suit, but provision for which may, and upon grounds of equity and justice ought to be, made by special legislation. But the discretion which Congress has in such matters would be very seriously trammelled, if the doctrine should be established, that it cannot appropriate money to pay particular claims, except at the risk of thereby recognizing the legal liability of the United States for the amount of other claims of the same general class.

The same considerations apply to the suggestion that the liability of the United States to McDougall's administrator, as upon contract, may arise from the failure or refusal of their law officers to prosecute appeals from judgments against the government in suits brought by other parties, holding similar claims. The question to be determined is, not whether the

representatives of the government have heretofore been guilty of neglect in not prosecuting such appeals, but whether, in the case in hand, the plaintiff has a valid claim in law against the United States.

Coming then to the inquiry whether the United States is legally liable on the contract between Wozencraft and McDougall, we are met at the threshold by the fact, found by the court below, that although the instructions to Wozencraft and his colleagues did not extend to or embrace contracts for the subsistence of the Indian tribes in California, they yet pursued the policy of providing for such subsistence in advance of the ratification by the Senate of treaties made with those tribes. That such a policy was, under all the circumstances, vital to the ends which those in charge of Indian affairs desired to accomplish, may be conceded under the facts found by the Court of Claims; and it may be that information of the proceedings of Wozencraft and his colleagues in making contracts for the supply of the Indians with provisions, beef, &c., and in all other respects, was given to the proper department at Washington, and that what they did was either approved or was not repudiated. While all this may be admitted, the question comes back upon us, what statute, in express words or by necessary implication, invested Wozencraft with power to bind the United States by such a contract as that made with McDougall, even had he been previously directed or authorized by the Interior Department to make contracts of that character in holding treaties with the Indians?

It is suggested that such authority may be found in the act of June 30, 1834, 4 Stat. 735, c. 162, the 13th section of which provided that "all merchandise required by any Indian treaty for the Indians, payable after making of such treaty, shall be purchased under the direction of the Secretary of War [afterwards changed to Secretary of the Interior, 9 Stat. 395, c. 108, § 5], upon proposals to be received, to be based on notices previously to be given; and all merchandise required at the making of any Indian treaty shall be purchased under the orders of the commissioners, by such persons as they shall appoint, or by such persons as shall be designated by the

President for that purpose; and all other purchases on account of the Indians, and all payments to them of money or goods, shall be made by such person as the President shall designate for that purpose. . . . And the superintendent, agent, or sub-agent, together with such military officer as the President may direct, shall be present and certify to the delivery of all goods and money required to be paid or delivered to the Indians." The 7th section of the same act provides that "it shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies agreeably to law; to obey all legal instructions given to them by the Secretary of War [afterwards changed to Secretary of the Interior], the Commissioner of Indian Affairs, or the Superintendent of Indian Affairs, and to carry into effect such regulations as may be prescribed by the President." These statutory provisions, it is argued, conferred authority upon officers of the executive department to purchase, without limit as to amount, "merchandise required to the making of any Indian treaty," and invested the President, through others, with power as well to make "other purchases on account of the Indians," as to make "payments to them of money or goods."

This, in our judgment, is too broad a construction of the statute. Congress did not intend to invest the President or the head of a department, or any officer of the government, with unrestricted authority in the making of treaties with Indians, or in regulating intercourse with them, to purchase merchandise for them, or to make payments of money or goods to them. It appropriated certain sums to enable the President to hold treaties with the various Indian tribes in California. To the extent of such appropriations the President, through persons designated by him, could purchase merchandise, required in the making of a treaty, and could make payment of money or goods on account of the Indians. But no officer of the government was authorized to bind the United States by any contract for the subsistence of Indians not based upon appropriations made by Congress. It is not claimed that the agreement between Wozencraft and Mc-

Dougall was made with reference to such appropriations. On the contrary, Wozencraft and his colleagues were informed by a communication from the Indian office, under date of June 27, 1851, that "when the appropriation of $25,000 for holding treaties was exhausted, they should close their negotiations and proceed with the discharge of their duties as agents simply, as the Department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress." The findings show that when the written agreement with McDougall was made, Wozencraft and his colleagues knew that the appropriations had been exhausted. Besides, the contract on its face shows that it was made with reference to appropriations to be thereafter made. The parties evidently relied upon Congress recognizing the wisdom and necessity of the policy adopted for the pacification of the Indians in California, and, by legislation, supplying the want of authority upon the part of Wozencraft and his colleagues to contract, in behalf of the United States, for the subsistence of the Indians in advance of the ratification of the treaties negotiated with them. That the policy pursued by Wozencraft and his colleagues was the only one that would have given peace to the inhabitants of California; that the Indians were induced by the promises of subsistence held out to them to abandon their lands to the whites, and settle upon reservations selected for them; and that the United States thereby acquired title to the lands so abandoned, are considerations to be addressed to Congress in support of a special appropriation to pay the claim of McDougall's administrator. They do not, in our judgment, establish or tend to establish, a claim against the United States enforcible by suit.

It appears, from the finding of facts, that McDougall did not die until after the expiration of nearly twenty years from the time his claim accrued, nor until after more than nine years from the passage of the act giving jurisdiction to the Court of Claims of suits against the United States founded upon contract, express or implied. It is stated that McDougall's claim was pending in the Interior Department at the time of his death in 1872. When it was presented to that Department is not

stated. It may not have been so presented until after the expiration of the period within which it would have been cognizable by the Court of Claims, had suit been brought thereon without first filing the claim in the Department. Whether, in that event, the bar of limitation was removed by the mere fact that the claim was transmitted to the court below by the Interior Department, is a matter upon which we express no opinion. No such question is formally raised, and, in view of the conclusion reached, it is not necessary to determine it. We rest our decision solely upon the ground that the contract of April 5, 1882, imposed no legal obligation upon the United States.

The judgment is reversed, with directions to dismiss the petition.

ROYALL *v.* VIRGINIA.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Argued March 18, 1887. — Decided March 28, 1887.

An information being filed against Royall for practising as a lawyer without having first obtained a revenue license, he pleaded payment of the license fee partly in a coupon cut from a bond issued by the State of Virginia under the provisions of the act of March 30, 1871, and partly in cash. The Commonwealth demurred to this plea. *Held:* that the demurrer admitted that the coupon was genuine and bore on its face the contract of the state to receive it in payment of taxes, &c., and that this showed a good tender and brought the case within the ruling in *Royall* v. *Virginia*, 116 U. S. 572.

On the 9th of February, 1887, an information was filed in the Husting's Court of Richmond, Virginia, against Royall that he "unlawfully did practise his profession as a lawyer in the courts of this Commonwealth, by prosecuting and defending actions and other proceedings without having first obtained the revenue license required by law so to do." To this Royall pleaded as follows:

Statement of Facts.

"And for a plea in this behalf the said William L. Royall comes and says that more than fifteen years back he was duly examined by judges of the State of Virginia, and found by them qualified to practise law as an attorney-at-law according to the mode and form of the statute law of Virginia; that having complied with all the other requirements of the statute law of said state, he was duly licensed to practise law in all the courts in said state according to the statute law of said state, and during all the time since then he has been actively engaged in practising his said profession as an attorney-at-law; that he has duly and regularly paid to the State of Virginia all license taxes assessed upon his said business as an attorney-at-law each year since he commenced practising his said profession; that on the first day of May, 1886, he tendered to Samuel C. Greenhow, who is treasurer of the city of Richmond, Virginia, one coupon for $15 and ten dollars in United States Treasury notes in payment of his license tax as an attorney-at-law for the ensuing year (all his license tax up to that date having been paid in full), and also seventy-five cents in silver coin for the fee of the commissioner of the revenue; that said coupon was cut from a bond issued by the State of Virginia under the provisions of an act of the General Assembly of the State of Virginia approved March 30, 1871, entitled "An act to provide for the funding and payment of the public debt; that it was overdue and past maturity and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due to the said state; that when he made said tender he demanded of said Greenhow a certificate in writing stating that he had deposited with him said coupon and money, but the said Greenhow refused to receive said coupon and money except for verification and identification, as provided for by an act of the General Assembly of the State of Virginia approved March 4, 1886, which is chapter 415 of the acts of 1885–1886, and he refused to give to defendant the certificate demanded or any other certificate until said coupon had been identified and verified, according to the provisions of chapter 415 of the acts of 1885–1886, hereinbefore referred

to, he declaring that he would give defendant said certificate after it should have been so verified, or, if defendant would pay in lawful money, he would receive said coupon for verification, and upon its verification he would return said money and receive said coupon as payment of said tax; that said Greenhow refused to receive said coupon and money as payment of said license tax and refused to give defendant the certificate demanded, because said last mentioned act forbade him so to do; that said act is repugnant to section ten of article one of the Constitution of the United States; that thereupon the defendant made the affidavit hereto annexed [omitted by the reporter], and presented it to R. B. Munford, who is the commissioner of the revenue for the city of Richmond, and demanded of him a revenue license as an attorney-at-law, and at the same time he presented to the said Munford the paper hereto attached [omitted by the reporter], and at the same time he offered to pay the said Munford any and all charges that he was entitled to receive before issuing said license, but the said Munford refused to issue to defendant a license as an attorney-at-law; that thereafter defendant practised his profession of attorney-at-law without a revenue license, but after having made the efforts hereinbefore described to obtain one, but not before; and this he is ready to verify. Wherefore he prays judgment, &c."

The Commonwealth demurred to this plea, and the defendant joined in the demurrer.

Mr. D. H. Chamberlain and *Mr. Bradley T. Johnston* for plaintiff in error, and *Mr. William L. Royall* for himself.

Mr. R. A. Ayers, Attorney General of Virginia, for defendant in error.

Mr. Chief Justice Waite delivered the opinion of the court.

This case cannot be distinguished in principle from that of *Royall* v. *Virginia*, 116 U. S. 572. The demurrer to the plea is an admission of record that the coupon tendered in payment

of the license tax was genuine, "and bore on its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, and demands due said State." This shows a good tender, which brings this case within the ruling by this court in the other.

The judgment of the Supreme Court of Appeals of the State of Virginia is reversed on the authority of Royall v. *Virginia, supra, and the cause remanded for further proceedings, not inconsistent with this opinion and the judgment in that case.*

GRANT *v.* PHŒNIX LIFE INSURANCE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 24, 25, 1887. — Decided April 4, 1887.

A *cestui qui trust* under twenty-six trust deeds of land, executed to five different sets of trustees, to secure the payment of money, filed a bill in equity in the Supreme Court of the District of Columbia, to procure a sale of the land. Some of the deeds covered only a part of the land. One of them covered the whole. All of the trustees were made defendants, and the bill was taken *pro confesso* as to all of them. As to the trustees in twenty-two of the deeds, the bill alleged that they had declined to execute the trusts. The holders of judgments and mechanics' liens and purchasers of some of the land were made defendants. Some of the trust deeds did not specify any length of notice of the time and place of sale by advertisement. The bill alleged the insolvency of the grantor and the inadequate value of the land to pay the liens. On an objection by the grantor that the *cestui que trust* could not maintain the bill: *Held*, that the objection could not be sustained.

The bill was not multifarious.

The Special Term made a decree for the sale of the land, without hearing evidence on issues raised by the pleadings. On appeal, the General Term reversed the decree, and remanded the cause to the Special Term for further proceedings, with permission to the parties to apply to the Special Term for leave to amend their pleadings; *Held*, that this was a proper order under § 772 of the Revised Statutes of the District of Columbia.

A decree in a prior suit held not to be pleadable as *res adjudicata*, in view of the proceedings in that suit.

Pleas filed with an answer, where the answer extends to the whole matter covered by the pleas, held to have been properly overruled.

The appointment of a receiver twenty days after the filing of the bill, to collect rents and to lease unrented property, upheld, as within the rule laid down in *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 395.

The appointment of a receiver by an interlocutory decree held not to have been superseded, because it was not expressly continued by the final decree.

Commissions on loans, not paid by the borrower to the lender, held not to constitute usury.

Bill in equity. Decree for complainant. Respondent appealed. The case is stated in the opinion of the court.

Mr. Joseph E. McDonald and *Mr. H. W. Blair* for appellant.

Mr. William F. Mattingly and *Mr. M. F. Morris* for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a suit in equity, brought in the Supreme Court of the District of Columbia, on the 17th of April, 1875, by the Phœnix Mutual Life Insurance Company, a Connecticut corporation, against Albert Grant and others, to enforce certain deeds of trust, 26 in number, executed by Grant and his wife to secure sundry sums of money, the plaintiff claiming to be the owner of all the debts secured by the deeds of trust, which cover various lots in square 760, in the city of Washington. The suit applies to lots 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, 16, 17 and 18, all of which but lots 16, 17 and 18 had buildings on them when the suit was brought. The total amount of principal moneys alleged in the bill to be due on the debts secured by the deeds of trust is $312,658.14. The trustees in the several deeds of trust, being five different sets of trustees, two in each set, are made parties defendant, as are certain judgment and mechanics' lien creditors of Grant, and purchasers from him. The bill alleges that Grant is insolvent; that the property is very much deteriorating for the want of necessary repairs to the buildings upon it, which Grant is

unable or unwilling to make; and that 10 of the buildings are unoccupied. The bill prays for the appointment of a receiver to rent and properly care for 12 of the lots; that the net amounts collected by the receiver be paid over to the plaintiff on account of the indebtedness; that the 14 lots covered by the trust deeds may be sold to pay the indebtedness due to the plaintiff; and that the proceeds of the sale be paid to the parties lawfully entitled thereto.

On the 7th of May, 1875, after a hearing, the court made an order appointing a receiver of 10 of the lots, to collect the rents of rented property, and to lease such as was unrented.

On the 6th of July, 1875, Grant demurred generally to the bill. This demurrer was overruled on the 8th of November, 1875, with leave to answer.

On the 27th of November, 1875, Grant filed an answer denying his indebtedness as to a large part of the amount claimed by the plaintiff, and denying generally the equities of the bill; and with the answer filed four pleas, setting up (1) a want of jurisdiction in the Court to decree a sale, on the ground that the only lawful authority to make the sale without the consent of Grant was vested in the several trustees; (2) the non-joinder of numerous parties named in the plea; (3) the illegality of the indebtedness claimed, because $9000 of illegal and usurious interest was charged by the plaintiff and paid by Grant on such indebtedness; (4) that all the indebtedness was paid and satisfied before the bringing of the suit.

On the same day, Grant filed a cross-bill, making as defendants the parties to the original bill and those named in the second plea, in which he set up that a contract had been made between him and the plaintiff, on the 1st of March, 1873, by the terms of which, among other things, all of his obligations to the plaintiff were to be surrendered to him in consideration of a deed in fee to be made by him to the plaintiff of 11 of the lots. The cross-bill prayed for a specific performance of such contract by the plaintiff.

On the 23d of December, 1875, the plaintiff moved to strike out the pleas, and also demurred to the cross-bill. On the 15th of March, 1876, the demurrer to the cross-bill was sustained,

with leave to amend. On the 20th of March, 1876, the plaintiff filed a general replication, joining issue with Grant. On the 6th of May, 1876, the Court in special term made an order referring the cause to the auditor of the Court to state the account between the plaintiff and Grant, the amount due under the several deeds of trust, the amounts due to the judgment and mechanics' lien creditors referred to in the bill, whether the same are liens upon any of the real estate, the relative priorities of the claims of such creditors and the plaintiff, and the value of the real estate. From this order Grant appealed to the General Term. On the hearing before the auditor he refused to receive evidence on the part of Grant in support of any of the defences raised by his answer.

On the 19th of June, 1876, the auditor filed his report, in which he reported upon the several matters referred to him, and found the amount due on the several deeds of trust on the real estate the sale of which the bill prayed for, to be $425,848.83, including interest, and stated the value of the fourteen lots and of the buildings upon them to be $200,425. Grant filed exceptions to this report, and on the 11th of December, 1876, the court made a decree overruling the exceptions and confirming the report. The decree directed that the fourteen lots be sold by trustees named in the decree, unless Grant should, by a day specified, pay into court for the plaintiff the sum of $407,117.58. In case of a sale, the proceeds were to be brought into court to abide further order. Grant appealed to the General Term from this decree.

On the 28th of March, 1877, a decree was made by the General Term, reversing the decree of the Special Term of December 11, 1876, setting aside the order of reference to the auditor and the proceedings thereunder, and remanding the cause to the Special Term for further proceedings, to commence with the cause as it stood after the filing of the replication and when application for the reference to the auditor was made, with leave to Grant to move to amend his cross-bill and to the plaintiff to apply for such order as it might be advised in regard to its replication. The decision of the General Term, reported in 3 MacArthur, 42, considers the objection

raised to the jurisdiction of the court to decree a sale, on the ground that by the trust deeds the sales were to be made by the trustees, and overrules it. It says: "The present case contains many particular features which seem to render the jurisdiction of the court absolutely indispensable in order that a fair sale should be made, and bidders should know beforehand that they could get a valid title under a decree in which the rights of every person having a claim upon the property had been ascertained and settled. From the face of the bill it appears that the property in question has been subdivided into numerous lots. Some of the deeds of trust are liens upon all the lots; others upon some of them only. Payments have been made on account of some of the claims, and none upon others. The aggregate liens exceed the value of the property, and the owner is apparently insolvent. Purchasers from Grant subsequent to the liens are parties to the bill, and in justice to them the securities should be marshalled. The parties in interest are numerous, and the complication of rights is so great that nothing can settle them except a decree in equity." It goes on to hold that the order of reference to the auditor was erroneous in the then condition of the cause, and that the issues raised by Grant ought to have been first tried in the usual way.

On the 21st of May, 1877, by leave of the court in Special Term, Grant filed amendments to his cross-bill. On the 23d of July, 1877, the plaintiff by an order of the Special Term, withdrew its replication filed March 20, 1876, and filed a general replication to the answer of Grant, and set down for argument the pleas filed with Grant's answer. On the 11th of September, 1877, Grant filed a supplemental answer, setting up as a bar to the suit a decree made by the Supreme Court of the District of Columbia, in equity, in a suit wherein Aaron Carter, Jr., and others were plaintiffs, and Grant and the Phœnix Mutual Life Insurance Company and others were defendants; and the company filed an answer to the amended cross-bill of Grant.

On the 12th of February, 1878, the court in General Term, on an application made by Grant at the Special Term and

which it ordered to be heard in the first instance by the General Term, made an order vacating the receivership and directing the receiver to deliver to Grant possession of ten of the lots, and to pay into the registry of the court all moneys in his hands derived from rents and profits.

On the 4th of March, 1878, the court in Special Term made an order overruling all of the pleas filed by Grant. Grant appealed to the General Term from so much of this order as overruled the 2d, 3d and 4th pleas.

On the 2d of July, 1879, the General Term affirmed the order of the Special Term overruling the 2d, 3d and 4th pleas, and remanded the cause to the Special Term for further proceedings. On the 22d of November, 1879, the plaintiff filed a replication joining issue with Grant on his supplemental answer to the bill.

Thereafter, testimony was taken by both parties on the issues raised. Testimony was taken at Hartford, Connecticut, on the part of the plaintiff, by commission. Grant moved to suppress certain depositions taken under that commission. The motion was granted as to three depositions and overruled as to the others. Complaint is made by Grant that upon the motion to suppress he was not permitted to read certain affidavits, and that he was denied leave to cross-examine orally certain witnesses at Hartford, and that he was denied an extension of time in which to take testimony in rebuttal of evidence taken on the part of the plaintiff at Hartford.

On the 9th of February, 1881, the Court in Special Term made an order referring the cause to the Court in General Term for hearing in the first instance.

On the 2d of March, 1882, the cause having been heard by the General Term on the pleadings and proofs, a decree was made by it declaring that Grant is not entitled to any relief under his cross-bill; that the plaintiff is the holder and owner of the several obligations of Grant secured by the deeds of trust of the real estate the sale of which the bill prays for; that Grant has made default in the payment of his said obligations, on which he is indebted to the plaintiff in large sums of money; that the taxes on the real estate are in arrear for

more than $20,000; that the indebtedness of Grant to the plaintiff largely exceeds the value of the real estate; that the plaintiff has no personal security for its debt; and referring the cause to the auditor of the court to state the account between the plaintiff and Grant, the amount due under the deeds of trust, the amounts due to judgment and mechanics' lien creditors, whether the same are liens upon any of the real estate, the relative priorities of the claims of those creditors and the plaintiff, the value of the real estate, the amount of taxes in arrear, and the particulars of any sales for taxes. The decree also appoints a receiver in the cause, to take possession of 12 of the lots and lease them, and enjoins Grant from interfering with the receiver in his possession and control of the property.

The reference was had before the auditor, and on the 1st of May, 1882, he filed his report, finding that there was due on that date from Grant to the plaintiff on the indebtedness secured by the trust deeds $285,202.09 of principal, and $225,-117.98 of interest, making a total of $510,320.07. The report also showed that the amount of taxes and interest thereon, in arrear, upon the real estate, was $48,755.05, and that the value of the 14 lots and the improvements upon them was $137,000. On the 5th of March, 1883, Grant filed exceptions to the auditor's report. The case was brought to a further hearing in the General Term, on its interlocutory decree of March 2, 1882, and on the report of the auditor, and on the exceptions of Grant thereto, and on the 16th of June, 1883, it made a final decree overruling the exceptions, confirming the report, and dismissing the cross-bill of Grant, and decreeing that unless Grant should, by a day specified, pay to the complainant the sum of $510,320.07, with interest on $285,202.09 from May 1, 1882, and the costs of the suit, the 14 lots should be sold by a trustee appointed by the decree, and the proceeds of the sale should be brought into court to abide further order. From that decree Grant has appealed to this court.

The first assignment of error is that the court erred in overruling the demurrer of Grant. The bill seeks to foreclose the equity of redemption of Grant in the property covered by

26 trust deeds executed to 5 different sets of trustees, the plaintiff being the *cestui que trust* in all of them, either originally or by purchase. Some of these deeds cover only one lot, others embrace two or more lots; and there is but one of them which embraces all of the property. All of the trustees are made defendants, and the bill has been duly taken *pro confesso* as to all of them. As to Gallaudet and Paine, trustees in 22 of the 26 deeds, the bill alleges that they have declined to execute their trusts. The bill also sets forth a number of judgments and mechanics' liens held by parties who are made defendants, none of the mechanics' liens covering the whole property, and a number of purchases of lots from Grant. The objection made is that the bill does not show a right in the plaintiff to maintain the suit; that each trust deed vests in its trustees a legal title to the property covered by it, with power to sell; that the interest of the *cestui que trust* is represented by the trustees, who must enforce the trust; and that unless the bill shows a failure on their part to do so, through incapacity or otherwise, the *cestui que trust* has no standing in court in its own right. The bill alleges that, in 12 of the deeds of trust executed January 1, 1872, to Gallaudet and Paine as trustees, the length of notice of the time and place of sale by advertisement is left blank; that this would prevent the trustees from executing such power of sale; but that in a court of equity the deeds would be considered as mortgages. It is urged on the part of Grant that this defective power of sale renders it the more necessary that the trustees, rather than the *cestui que trust*, should act in either seeking a correction of the defect or in enforcing the trust. But we think there is nothing in the objection thus raised. The case is one clearly of equity cognizance, for the reasons above set forth and those contained in the opinion of the General Term above quoted. No objection is made on the part of any of the trustees to the maintenance of the suit. The bill is taken as confessed as to all of them, and there is no possible prejudice to the defendant Grant, in the bringing of the bill in its actual shape by the *cestui que trust*.

Nor is the bill open to the objection that it is multifarious.

The fact that one of the deeds of trust covers the entire property, and that some of the creditors of Grant who were made defendants have liens upon various portions of that property, makes it eminently proper, and indeed indispensable, if a clear title is to be given by a sale, to adjudicate all the claims in one suit.

The second assignment of error is that the General Term erred in its decree of March 28, 1877, in remanding the cause to the Special Term for further proceedings, after it had reversed the decree of the Special Term of December 11, 1876, and especially in then authorizing the plaintiff to apply to the Special Term for such order as it might be advised in regard to its replication. The ground taken is, that as, at the time of the hearing which resulted in the decree of the Special Term of December 11, 1876, no testimony had been taken upon any of the issues raised by the pleadings, and as the plaintiff had gone to hearing in that state of the case, and had obtained a decree of sale in the Special Term, that decree was a final decree in its favor on the merits; and that, on the hearing in the General Term, on the appeal of Grant, upon the same record, the General Term, finding the decree of the Special Term to have been erroneous, was bound to enter a decree on the merits in favor of Grant, reversing the decree of the Special Term and dismissing the bill. But we are of opinion that the General Term had power to make its decree of the 28th of March, 1877. The error of the Special Term was in making a decree of sale on the report of the auditor, without a trial of the issues raised by the pleadings. For that error its decree was reversed, and it was proper for the General Term to remand the cause to the Special Term for further proceedings in the taking of testimony on the issues, and with permission to the parties to apply in the Special Term for leave to amend their pleadings. This was, within § 772 of the Revised Statutes of the District of Columbia, a modification of the decree of the Special Term, on an appeal involving the merits of the action. The decree of the General Term reversed that of the Special Term and vacated the order of reference to the auditor, and all proceedings thereunder, and the further

directions in the decree of the General Term were but modifications of the decree of the Special Term.

The third assignment of error is, that the court erred in not sustaining Grant's defence of *res adjudicata*, as set up in his supplemental answer of September 11, 1877. There is attached to that answer a transcript of the record in the suit of Carter and others against Grant and others. The bill in that case was filed on the 30th of October, 1872, and was brought by three judgment creditors of Grant, on their own behalf and that of all others similarly situated, who should become parties. The defendants in it were Grant and his wife, the Phœnix Mutual Life Insurance Company, the trustees in the various trust deeds sought to be enforced by that company, and various creditors of Grant. It set forth the existence of the various deeds of trust mentioned in the bill in this suit, and prayed for the sale of 12 of the lots covered by those deeds of trust, and that the proceeds of the sale, after satisfying all valid prior liens upon the lots, be applied to the payment of the complainants' judgments. An amended and supplemental bill having been filed in the Carter suit, the Phœnix Mutual Life Insurance Company filed an answer, on the 12th of June, 1874, setting up that Grant is indebted to it in the full amount called for by the several deeds of trust held by it; that the amount of said indebtedness is equal to the value of the property; and that it is willing that the property should be sold under the decree of the court and all equities adjusted on the distribution of the fund, claiming, at the same time, that the judgment creditors have no standing in court without having first offered to redeem the incumbrances on the property which are prior in date to the judgments. After a decree by the Special Term in favor of the plaintiffs in the Carter suit, directing a sale of 12 of the lots free from all liens, and that the proceeds be brought into court, and that all equities between the parties to the cause be reserved for consideration on the distribution of the fund, the General Term, on an appeal to it by Grant from the decree, reversed it on the 6th of March, 1875, and dismissed the bill.

We are of opinion that there is nothing in the record of the

Carter suit, or in the above-recited proceedings therein, or in any other proceedings therein, which operates to sustain the defence of *res adjudicata*. The Phœnix Company was a defendant, and merely a defendant, in the Carter suit, subject to the decree which might be made therein, setting up and maintaining its claims, and expressing its willingness that the property in question should be sold and the equities adjusted on the distribution of the proceeds of sale. The plaintiffs' bill being dismissed out of court, there is nothing which can operate as a bar to the bill in the present suit.

The fourth assignment of error is, that the court erred in overruling the 2d, 3d and 4th pleas to the bill. The ground on which the General Term affirmed the order of the Special Term overruling the pleas is stated in the opinion of the General Term, delivered by Mr. Justice Cox, MacArthur & Mackey, 117, to have been, that the 2d, 3d and 4th pleas, to which alone the appeal related, raised defences that were covered by the answer of Grant. That answer distinctly sets up the defence of usury, covered by the 3d plea, and the defence of payment, covered by the 4th plea. The 2d plea, relating to the want of proper parties, was overruled on the ground that the necessity of making the omitted persons parties was not apparent. We concur in the disposition made, for the reasons thus stated, of these pleas. The defendant has had, under his answer, the benefit of the defences of usury and payment set up in the 3d and 4th pleas; and the rule that no plea is to be held bad only because the answer may extend to some part of the same matter as may be covered by the plea, is not applicable where the answer extends to the whole of the matter covered by the plea.

The fifth assignment of error complains that the court overruled the motion of Grant to suppress certain depositions taken by the plaintiff at Hartford, when these depositions had been taken after the time limited for the taking of depositions by the plaintiff, and the witnesses had refused to answer certain cross-interrogatories propounded by Grant, and for other irregularities appearing on the motion to suppress the depositions; and the sixth assignment of error complains that the court

erred in refusing to allow Grant further time to take depositions in rebuttal of the depositions on the part of the plaintiff. We are unable to see that the court did not exercise a proper discretion in its action in the matters thus complained of.

The seventh assignment of error is, that the court took the property in controversy out of the possession of Grant by the appointment of a receiver before a sale, and thus deprived him of the use of the property and of its rents and profits; and that it erred in the final decree, in finding the equities of the case in favor of the plaintiff and against Grant, and in dismissing the cross-bill of Grant and ordering a sale of the property.

The original order for the appointment of a receiver was made on the 7th of May, 1875. It put into the possession of the receiver ten of the lots, with power to collect the rents of such of them as had been rented and to lease the others. After a lapse of thirty-three months, and on the 12th of February, 1878, the General Term, in which a motion to discharge the receiver was heard in the first instance by order of the Special Term, made an order vacating the receivership. The opinion of the General Term in this matter, reported in 3 MacArthur, 220, shows that the ground taken by the majority of the five judges, (two of them dissenting from the decision,) in discharging the receivership, was, that it had failed to accomplish its purpose, and that the property was going to destruction without yielding a revenue sufficient to pay the ordinary taxes. The receivership was renewed by the decree of the General Term of March 2, 1882, establishing the rights of the plaintiff and ordering a sale of the twelve lots. The defendant contends that the court had no power, before a sale to appoint a receiver of the property involved in the litigation, and thus deprive him of its use and of its rents and profits, on the ground that the trust deeds do not embrace the rents and profits of the property. But we are of opinion that the original appointment of a receiver, and the appointment of one made by the decree of the General Term, of March 2, 1882, were proper, and were a reasonable exercise of the discretion of the court, within the principle stated by this court, speak-

ing by Mr. Justice Bradley, in *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 395, in these words: "Courts of equity always have the power, where the debtor is insolvent, and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagor, as by cutting of timber, suffering dilapidation, &c., to take charge of the property by means of a receiver, and preserve not only the *corpus*, but the rents and profits, for the satisfaction of the debt." The circumstances which, within this rule, justified the exercise of the discretion of the court in appointing a receiver originally, existed in greater force when the receiver was appointed by the decree of March 2, 1882. A point is made, that, as the appointment of the receiver made by the interlocutory decree of March 2, 1882, was not expressly continued by the final decree of June 16, 1883, it was superseded; but there is no force in this suggestion.

In the final decree, the Court found to be due the whole debt shown on the face of the trust deed of August 26, 1871, to Davis and Downman, trustees, covering 14 lots, to secure $40,000 due to one Fletcher, and also the whole debt shown on the face of the 12 trust deeds of January 1, 1882, to Gallaudet and Paine, to secure in the aggregate to the plaintiff $81,000. It is claimed by Grant that the trust deed to Davis and Downman, and the several trust deeds to Gallaudet and Paine, were executed to secure loans from the plaintiff; that Fletcher was the agent of the plaintiff in the Davis and Downman trust deed; and that the trust deeds of January 1, 1872, to Gallaudet and Paine, for $81,000, provided for and in effect paid the $40,000 Fletcher indebtedness secured by the Davis and Downman trust deed. We have examined the evidence on this point, and are of opinion that the contention of Grant is not sustained by it. It is not profitable to discuss it.

It is also contended by Grant, that the loans received by him from the plaintiff were upon usurious interest to the amount of $9000, and that thereby the entire interest decreed was forfeited. But we are of opinion that the evidence shows that the commissions paid by Grant upon the loans, (in

which the usury is alleged to have consisted,) were not paid to the plaintiff. The plaintiff made no contract for usurious interest nor did it take any. *Call* v. *Palmer*, 116 U. S. 98.

The gravamen of the cross-bill of Grant is, that his debt to the plaintiff was extinguished by reason of a contract of sale entered into by him with it, by which, in consideration of the advances it had made to him, and of the amount due from him to it on the several trust deeds, and certain other considerations, he agreed to convey to it 11 of the lots involved in this litigation. It is sufficient to say, that the proofs do not sustain the existence of any such contract. No such contract was ever executed in writing, none was even in part performed by either of the parties, and letters which passed between them subsequently to March 1, 1873, (the alleged date of the contract,) show that no such contract was understood by them to exist.

Other minor considerations are urged in the briefs of the appellant, which we have considered, but which it is not deemed important to discuss at length. We see no error in the final decree of the court below, and it is

Affirmed.

GRANT & Another *v.* PHŒNIX LIFE INSURANCE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued March 25, 1887.— Decided April 4, 1887.

In a suit in equity to enforce trust deeds, a receiver appointed to receive rents and to lease unrented property, may apply to the court for directions in regard to the expenditure of funds in his hands as receiver.

The reference of a suit in equity by the Special Term of the Supreme Court of the District of Columbia to the General Term for hearing in the first instance does not deprive the Special Term of authority to afterwards hear such application of the receiver, especially when the General Term has made an order granting leave to the receiver to apply to the Special Term for instructions.

Such an application may be made by the receiver to the Special Term even

after an appeal to this court from the final decree of the General Term, which operates as a supersedeas.

An order of the General Term remanding to the Special Term a petition of the receiver that a tenant may attorn to him, for inquiry into the facts, and action on the petition, is an interlocutory order and not appealable to this court.

THE case is stated in the opinion of the court.

Mr. Joseph E. McDonald and *Mr. H. W. Blair* for appellants.

Mr. William F. Mattingly and *Mr. M. F. Morris* for appellee.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

After the making of the final decree of June 16, 1883, by the General Term of the Supreme Court of the District of Columbia, in the case of the Phœnix Mutual Life Insurance Company against Albert Grant and others, the appeal from which decree, (taken by Grant,) has just been decided, [*ante*, 105,] the receiver appointed by the interlocutory decree of March 2, 1882, obtained from the court in Special Term, on the 8th of January, 1886, an order, on notice to Grant, authorizing the receiver to make such necessary repairs to the houses on the lots involved in the litigation as in his judgment are essential to the preservation of the property and to its occupation by tenants, with due regard to economy, and, among other repairs, to put in proper working condition the machinery and apparatus used in supplying the houses with water. Grant appealed to the General Term from this order, and on the 5th of April, 1886, it was affirmed. Grant has appealed from this order of affirmance to this court.

On the 11th of October, 1884, the receiver appointed by the interlocutory decree of the General Term, of March 2, 1882, applied by petition to the Supreme Court of the District of Columbia, in Special Term, for an order requiring Henry W. Blair, not a party to the cause, but who was in the possession and occupation of the house on one of the lots covered by the

decree, to attorn and pay rent to the receiver. On a hearing, on notice to Blair and on his appearance, the Special Term directed the application to be heard in the first instance by the General Term; and the General Term, on the 5th of April, 1886, made an order remanding the matter to the court in Special Term, for reference by it to the auditor of the court, with leave to Blair to show by proof the time when, and the terms and conditions under which, he entered into possession of the property in question, under Grant, the amount of money paid by him to Grant, for what purpose it was paid, and whether such money or any part thereof, and how much, was expended by Grant in betterments upon any of the property in the custody of the receiver, with leave to the plaintiff, and to the receiver also, to introduce pertinent testimony before the auditor, the auditor to ascertain all facts material to the subject matter of the reference, and report the same, with his conclusions, to the court in Special Term, for its action. From this order Blair and Grant have appealed to this court. The appellants contend, on these two appeals, (1) that the receiver, not being a party to the cause, has no independent standing in court, and cannot institute any proceeding on his own motion; (2) that the Special Term of the Supreme Court of the District of Columbia has not, since its order made on the 9th of February, 1881, referring the cause to the court in General Term, for hearing in the first instance, had any jurisdiction of the suit; (3) that the General Term has had no jurisdiction of the suit since the perfecting of the appeal to this court from the final decree of June 16, 1883.

We are of opinion that a receiver such as the one in this case, in charge of property such as that in this case, has a right to apply to the court for directions in regard to the expenditure of funds in his hands as receiver.

In regard to the jurisdiction of the Special Term since the order of the 9th of February, 1881, we are of opinion that the making of that order did not deprive the court in Special Term of its jurisdiction to act in the matter covered by the order of the 8th of January, 1886. Besides, the General Term, in its interlocutory decree of March 2, 1882, granted

leave "to the receiver to apply to the court, or this court in Special Term, for such instructions and orders as may be proper."

We are also of opinion that the appeal to this court from the final decree of June 16, 1883, even though perfected with a *supersedeas*, did not deprive the court below of its power to adjudicate upon such a matter as that involved in the order of January 8, 1886. There is nothing in this view inconsistent with the general rule that an appeal suspends the power of the court below to proceed further in the cause, by executing the decree. The order of January 8, 1886, was strictly confined to the preservation of the property in litigation.

As to the order of the General Term of April 5, 1886, in the Blair matter, it was clearly merely an interlocutory order, and not a final one, in reference to the matter to which it relates, as it merely directed proceedings in the court in Special Term in reference to the application made in regard to Blair, with a view to a decision upon the application.

The order affirming the order of January 8, 1886, is affirmed, and the appeal from the order of April 5, 1886, in regard to Blair, is dismissed for want of jurisdiction.

BLOOMFIELD *v.* CHARTER OAK BANK.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

Argued January 5, 6, 1887. — Decided April 4, 1887.

A town in Connecticut cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote of the inhabitants at a meeting warned by publicly posting a notice specifying the subject of the vote; and any one, who relies upon a vote as giving him rights against the town, has the burden of proving such a notice, although the selectmen and town clerk have neglected their duty of filing and recording the notice, and although the record of the meeting states that it was "legally warned."

The property of any inhabitant of a town in Connecticut may be taken on execution upon a judgment against the town.

Statement of Facts.

Neither the selectmen nor the treasurer of a town in Connecticut have general power to make contracts, to borrow money, or to incur debts, in behalf of the town.

The reports made to an annual meeting of a town in Connecticut by the selectmen and treasurer, as required by statute, are not, unless acted on by the town, evidence to charge it with debts which those officers had no authority to contract in its behalf.

A promissory note, made by the treasurer of a town in Connecticut to a bank, of which he has borrowed money without the knowledge of the town, does not bind the town, unless authorized or ratified by a vote of the town at a meeting warned for the purpose; and is not made valid, nor the town estopped to deny its invalidity, by the acceptance, at an annual meeting, of the reports of the selectmen and treasurer, showing various sums paid to other persons, or received, "on town notes," and an "indebtedness of the town by notes;" or by a vote at a subsequent meeting duly warned, authorizing the selectmen to pay certain notes made by the treasurer to other persons, and by the selectmen's paying those notes accordingly.

This action was brought June 5, 1880, by a national bank against the Town of Bloomfield in the State of Connecticut, upon three promissory notes, dated June 20, June 21, and July 1, 1879, and payable three months after date, for the aggregate sum of $19,433.30, and all alike in form, the first being as follows:

"Hartford, June 20, 1879. $5500. Three months after date The Town of Bloomfield promise to pay to the order of S. J. Mills fifty-five hundred dollars at Charter Oak National Bank. Value received.

"S. J. Mills, Treasurer."

The answer denied that the defendant made the notes, or that Mills, as its treasurer, had authority to make them in its behalf.

A trial by jury was had, resulting in a verdict for the plaintiff in the full amount of the notes and interest; and a bill of exceptions was tendered by the defendant and allowed by the court, so much of which as is material to be stated was as follows:

The Town of Bloomfield was incorporated in the usual manner of Connecticut towns, by a resolve of the legislature of Connecticut, in May, 1835, by which the inhabitants of the

town and their successors forever residing therein "shall have and enjoy all the powers, privileges and immunities which are enjoyed by other towns in this state."

It was admitted that Mills was elected treasurer of the town on October 5, 1868, and was reëlected annually and acted as treasurer until July 16, 1879, when he resigned; and that he made and signed the notes in suit, and indorsed them to the plaintiff.

The defendant objected to the admission of the notes in evidence, because the plaintiff had shown no authority from the defendant to Mills to borrow money or execute notes. But the court, against the defendant's objection and exception, admitted the notes, "subject to the duty of the plaintiff to prove such authority."

The plaintiff then offered in evidence a copy, certified by the town clerk February 16, 1877, of the record of this vote of the town:

"At an annual town meeting, legally warned and held at the usual place, October 5, 1868; S. J. Mills, moderator; H. W. Rowley, assistant town clerk; Voted, That hereafter the town treasurer be authorized and empowered to borrow money for the use of the town."

The defendant objected to the admission of this vote, because the plaintiff offered no evidence that the warning of that meeting specified any such object as was contained in the vote. It was admitted that the warning had not been recorded by the town clerk, and was not on file in his office.

The court overruled the objection, and admitted the vote in evidence, "not as showing a legal or valid vote of the town, but subject to the duty on the part of the plaintiff to prove that the town at its meetings, by its affirmative acts and conduct, had assented to and treated as authoritative the power of the treasurer under said vote to borrow money for the use of said town; or for the purpose of establishing that by the course of conduct of the town in its town meeting it had practically established the authority of the treasurer under said vote; and of establishing an estoppel in pais against the power of the town to treat as invalid a vote the validity of which

had been affirmatively declared by its acts, if it should appear that the defendant had intentionally caused the plaintiff to believe in a state of facts which it now claims not to exist, and induced it to act on such belief." To this ruling the defendant excepted.

The plaintiff thereupon, "for the purpose of proving that the town had made the said Mills its general agent in fact to borrow money, and had at its town meetings, and by its affirmative acts in said meetings, treated the treasurer as authorized under said vote to borrow money for the town," offered the following evidence:

1st. Forty-four notes, for the aggregate sum of more than $64,000, made by Mills as treasurer in behalf of the town to sundry persons, other than the plaintiff, and mostly citizens of Bloomfield, between the times of the passage of that vote and of his resignation, all of which bore indorsements of payments of interest, and had been paid and taken up.

2d. Copies of the annual printed reports made by the selectmen of the town, together with the treasurer's annual reports, to the annual town meetings from 1869 to 1878 inclusive; and the records of the town meetings, showing the action of the town thereon.

The reports of those officers in 1869 showed sums paid for "interest on town notes" to sundry individuals named, $1507, and to two of them for "town notes taken up," $1646.58; "indebtedness of town by notes, $27,100;" and "amount received on town notes, $6559.88." The reports in the subsequent years showed similar items, varying in amount, and the "indebtedness of the town by notes" gradually increasing to $48,416.28. It was admitted that the sums paid for interest included the payments of interest on the forty-four notes aforesaid.

The records of the town meetings showed that at an adjournment of the annual meeting of 1868 it was "Voted, That the selectmen be directed to have the report of items of account printed yearly, 500 copies;" that at the annual meeting in 1869, the reports of the selectmen and treasurer were "read and accepted;" that in 1870, "the reports of selectmen and

town treasurer, being in printed form, were not called for;" and that there was no record of any action of the town at the subsequent meetings with reference to such reports. But it was admitted that the printed reports were in fact distributed to all who attended those meetings.

3d. A vote of the town, passed at a special meeting, duly warned, and held May 29, 1880, authorizing the selectmen to make and deliver notes in the name and behalf of the town to take up and cancel "certain memoranda of indebtedness, signed by the selectmen or other officers of said town, and all bearing date July 1, 1879," for money lent to the town and unpaid. Also, evidence that, in pursuance of this vote, the selectmen took up twenty notes, some signed by Mills as treasurer, and others both by him as treasurer and by the selectmen, amounting in all to $45,184, and given by him in their presence on July 1, 1879, to various persons, in renewal of or substitution for notes which he had previously given to them; and that these notes were afterwards taken up and paid by the selectmen.

The defendant objected to all this evidence as irrelevant and immaterial. But the court admitted it, for the reasons above stated, and the defendant excepted to its admission.

The bill of exceptions proceeded as follows:

"The plaintiff's account with Mills as such treasurer commenced in March, 1871, and continued until July, 1879. The first note which he procured to be discounted as such treasurer was discounted on March 24, 1871, and thereafter he continuously obtained discounts and renewals of old notes until the date of the last note, when the three notes in suit were outstanding. The aggregate of his account was over $250,000.

"In this account, he deposited moneys of the town, and, without the knowledge of the plaintiff, small amounts of his own, and checked out from said account, both for the use of the town, and, without the knowledge of the plaintiff, small amounts for himself.

"The plaintiff offered evidence and attempted to trace each note in suit, so as to show that nearly the whole amount of the proceeds of said notes went to the use of the town, and that

nearly all of the checks drawn against said proceeds were given to inhabitants of the town in payment of town orders given by the selectmen. But no evidence was offered to show that the town in its town meeting assembled knew that Mills kept his bank account with the plaintiff, or that he was borrowing the money represented by these notes, or those of which these were renewals, of the plaintiff.

"The plaintiff disclaimed any advantage by virtue of being indorsee of the notes rather than payee, and did not claim that it stood on that account in any other relation to the defendant than if it had been the payee.

"The plaintiff also offered evidence which the defendant claimed showed that at the time when the plaintiff first obtained a copy of said vote of October 5, 1868, from the town clerk of said town, viz., on February 22, 1877, all the moneys represented by the notes in suit had been advanced to said Mills, treasurer, except the sum of $1500, and the notes in suit, except so far as said $1500 was concerned, were renewals of notes made before said date, and before the plaintiff knew of said vote from the record itself. The plaintiff denied the validity of said claim.

"It sufficiently appeared from the evidence in the case that the plaintiff supposed or thought that Mills was authorized to borrow money for the use of the town and give its notes therefor, from the commencement of the account of the plaintiff with Mills as such treasurer.

"There was no other evidence in regard to any affirmative acts of the town in its town meetings assembled, which would constitute an agency in Mills, or raise an estoppel against the town, other than those which are hereinbefore contained; and this comprised all the evidence in the case in regard to estoppel, ratification, or agency, the court having confined the plaintiff in its testimony to acts of the town in town meetings, and excluded any acts or knowledge of the selectmen."

The plaintiff thereupon rested its case; and the defendant again objected to the admission in evidence of the notes sued on, and the vote of October, 1868, on the grounds above stated; also on the grounds "that no sufficient evidence had

been offered to prove a ratification by the town of the said vote, or to establish any estoppel against the town which would prevent it from setting up the invalidity of said vote, or in connection with said vote to prove a general authority given by the town to Mills to borrow money for the town and give notes therefor, sufficient to make the town liable on the notes in question;" "that the town, as a municipal corporation, had no inherent power to borrow money or give notes therefor, nor had any special authority therefor been proved; that even if it had such power, it could only exercise it by a vote specifying objects for borrowing money, which were within the duties of the town to perform, and limiting the amount so to be borrowed; and that even if the town had such power, it could not delegate to its treasurer power to borrow money, unlimited either in object or in amount;" "that by proper construction of said vote, it did not authorize any person who might thereafter be treasurer to borrow any sum of money which he might think fit, and make the town liable therefor, and did not authorize Mills to borrow the money and give the notes in question;" and "that even if the town had given authority to Mills to borrow, it had not given him power to give negotiable promissory notes like those in suit for the money so borrowed."

But the court overruled the objections, and admitted the notes and the vote in evidence, and to this ruling the defendant excepted.

The defendant then introduced evidence tending to show that the warning of the town meeting of October 5, 1868, did not, in fact, contain any notice that the matter of authorizing the treasurer to borrow money would come before the meeting; and also evidence tending to show that Mills, during all the time from 1869 to 1879, was largely in default to the town, having embezzled large sums of money belonging to the town, in addition to the sums obtained by him from the plaintiff, and that the moneys obtained by him from the plaintiff were not used to pay debts of the town, or, if so used in part, only to pay debts for the payment of which the town had furnished him sufficient money, which he had embezzled

Counsel for Parties.

as aforesaid, and so were in fact obtained and used by him for his own purposes, to cover such embezzlement.

The defendant also put in sundry votes passed by the town in 1862, 1863 and 1864, authorizing the selectmen to borrow money to pay bounties to soldiers, and to give orders on the town treasurer or notes of the town therefor, which votes had been ratified and confirmed by the legislature of Connecticut before the town meeting of October 5, 1868; as well as evidence that at the meeting of May 29, 1880, and before the passing of the vote above mentioned, one of the selectmen read to the meeting a list of the notes signed by Mills as treasurer, either alone or with other officers of the town, which contained no notes given by Mills to the plaintiff.

Before the charge to the jury, the defendant renewed its objections by requests for instructions, which the court refused to give.

The court instructed the jury that in the absence of all testimony there was no presumption that the warning of the town meeting of October 5, 1868, specified the subject of giving authority to borrow money; and that the vote of that meeting, "standing alone, did not give general authority to borrow money and to act as general agent in that regard;" but submitted the evidence in the case to the jury as sufficient to authorize them to find that the defendant, by continuous and affirmative action and conduct in its town meetings, knowing that its treasurer had generally and freely borrowed money and given notes under that vote, had made him in fact its general agent for that purpose, had held him out to the plaintiff as such, and had ratified his acts, and was estopped to deny their validity.

The defendant excepted to the refusal to instruct as requested, and to the instructions given, and sued out this writ of error.

Mr. Charles E. Perkins for plaintiff in error. *Mr. A. F. Eggleston* was with him on the brief.

Mr. Alvan P. Hyde for defendant in error.

Opinion of the Court.

MR. JUSTICE GRAY, after stating the case as above reported, delivered the opinion of the court.

We have not found it necessary to consider how far a town in Connecticut has the power to give promissory notes, because in our opinion the evidence in this case is incompetent to prove that this town ever authorized its treasurer to make the notes in suit, or did any act which made them binding on the town.

Towns in Connecticut, as in the other New England States, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the State is divided by the legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; they have those powers only, which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of a town are members of the *quasi* corporation. 1 Swift's System, 116, 117; *Granby* v. *Thurston*, 23 Conn. 416; *Webster* v. *Harwinton*, 32 Conn. 131; Dillon Mun. Corp. §§ 28–30.

In Connecticut, as in Massachusetts and Maine, by common law or immemorial usage, the property of any inhabitant may be taken on execution upon a judgment against the town. *Atwater* v. *Woodbridge*, 6 Conn. 223, 228;[1] *McLoud* v. *Selby*, 10 Conn. 390;[2] *Beardsley* v. *Smith*, 16 Conn. 368;[3] 5 Dane Ab. 158; *Chase* v. *Merrimack Bank*, 19 Pick. 564, 569;[4] *Gaskill* v. *Dudley*, 6 Met. 546;[5] *Adams* v. *Wiscasset Bank*, 1 Greenl. 361;[6] *Fernald* v. *Lewis*, 6 Greenl. 264. See also *Hopkins* v. *Elmore*, 49 Vt. 176; Rev. Stats. N. H. 1878, c. 239, § 8.

A town cannot make a contract, or authorize any officer or agent to make one in its behalf, except by vote in a town meeting duly notified or warned; and the notice or warning must specify the matter to be acted on, in order that all the inhabitants (whose property will be subject to be taken on execution to satisfy the obligations of the town) may know in advance what business is to be transacted at the meeting.

[1] *S. C.* 16 Am. Dec. 46. [2] *S. C.* 27 Am. Dec. 689. [3] *S. C.* 41 Am. Dec. 148.
[4] *S. C.* 31 Am. Dec. 163. [5] *S. C.* 39 Am. Dec. 750. [6] *S. C.* 10 Am. Dec. 88.

If the subject of the vote is not specified in the notice or warning, the vote has no legal effect, and binds neither the town nor the inhabitants. No one can rely upon a vote as giving him any rights against the town, without proving a sufficient notice or warning of the meeting at which the vote was passed. *Reynolds* v. *New Salem*, 6 Met. 340; *Stoughton School District* v. *Atherton*, 12 Met. 105; *Moor* v. *Newfield*, 4 Greenl. 44; Dillon Mun. Corp. §§ 266–268.

Upon this point the statutes and decisions of Connecticut are perfectly clear.

The statutes require the annual town meetings to be held in October, November or December, and permit special meetings to be convened when the selectmen deem it necessary, or on the application of twenty inhabitants qualified to vote in town meetings; and provide for notifying or warning both annual and special meetings as follows: "When town meetings are to be held, a notification, either written or printed, specifying the objects for which they are to be held, signed by the selectmen, or a majority of them, set upon the sign post or sign posts in the towns, at least five days inclusively before the meeting is to be held, shall be sufficient notice to the inhabitants to attend such meeting." Rev. Stats. 1866, tit. 7, §§ 19, 21; 1821, tit. 103, § 2. They also provide that "the warning of every meeting of any borough, city, ecclesiastical society, school society, school district, or other public community, shall specify the objects for which such meeting is to be held." Rev. Stats. 1866, tit. 7, § 232.

Whenever a town meeting is warned agreeably to the provision above quoted, the statutes, with a view to preserving the best evidence of the contents of the notice or warning, make it the duty of the selectmen to cause a copy or duplicate thereof to be left with the town clerk before the meeting, and the duty of the clerk to record it. Rev. Stats. 1866, tit. 7, § 19. But these duties are imposed on the selectmen and the clerk as public officers, not as agents of the town. They are not made duties of the inhabitants of the town in their corporate capacity, but official duties of those charged with their performance. The neglect of the officers to file or to record a sufficient

notice of a town meeting is theirs only, and not the neglect of the town. So far as the town is concerned, the utmost effect of an omission to record the notice is to authorize its contents to be proved by other evidence. *Brunswick First Parish* v. *McKean*, 4 Greenl. 508.

The annual election of town officers, or any other act which the statutes require to be done by the inhabitants at each annual meeting, might perhaps be sufficiently proved by the record of what was done at the meeting, without proving a special notice of it in the warning. *Thayer* v. *Stearns*, 1 Pick. 109; *Gilmore* v. *Holt*, 4 Pick. 258. But, with those exceptions, such a notice is a necessary prerequisite to the validity of any act of the town, either at the annual meeting or at a special meeting.

The statutes, for instance, provide that "the inhabitants of the respective towns, in legal meetings assembled, shall have power" to make certain by-laws for the welfare of the towns. Rev. Stats. 1866, tit. 7, § 31; 1821, tit. 103, § 6. But it has always been held that no by-law, though passed at an annual meeting, is valid, without a previous notice thereof in the warning.

In the leading case, decided in 1824, of *Hayden* v. *Noyes*, 5 Conn. 391, where the annual meeting of a town was warned to choose town officers, "and to do any other business then thought proper by said meeting," the Supreme Court of Errors decided that by-laws passed at that meeting, to regulate the shell fishery of the town, were void; and Chief Justice Hosmer, delivering judgment, said:

"By the act concerning towns, the mode of warning town meetings is specially prescribed. There is to be a notification in writing, 'specifying the objects for which they are to be held,' signed by the selectmen, and set upon the public sign post or posts in the town, at least five days before the meeting. A meeting not warned agreeably to the mode designated is no legal congregation of the town; and its acts in that capacity are void. If the object be to regulate the clam and oyster fisheries, that object must be specified in the warning, in an intelligible manner. A notification to assemble a town meeting for a lawful purpose, duly specified, and to *do other*

town business, is, except as to the specification, as entirely exceptionable as if the town were warned to meet and do any business they should think proper. It is the purpose of the law, not to prescribe a frivolous form, but to give substantial information. If the object of the meeting is specified, it will present a motive to the inhabitants to be present, and they will leave business, even if it be pressing, provided they feel an interest in the subject to be determined. On the other hand, if the subject is unimportant, and any of the inhabitants should feel no concern in the result, they may with safety pursue their ordinary business; and this certainly is matter of convenience." "The warning, in the case before us, neither conforms to the words nor spirit of the law, and, if sanctioned, would repeal the statute." 5 Conn. 395, 396.

In a similar case in 1830, that decision was followed, and it was adjudged, reversing the judgment of a lower court, that it was incumbent on the party offering the vote of the town in evidence, and seeking to avail himself of it, to prove that the meeting was duly warned, although the vote purported on its face to have been passed by the town "in legal meeting assembled;" and the court said: "The borough and the town are, confessedly, inferior corporations. They act not by any inherent right of legislation, like the legislature of the State; but their authority is delegated; and their powers, therefore, must be strictly pursued. *Within* the limits of their charter, their acts are valid; *without* it, they are void. It having been established, in the case of *Hayden* v. *Noyes*, above cited, that to render an act of a town, precisely of this character, valid, it must appear that the meeting of the town had been specially warned for that purpose; and this not appearing on the doings of the town, in this case, nor from any proof *aliunde* to establish the fact, the judgment is erroneous. Perhaps it should appear on the face of the proceedings; but, at least, he who seeks to enforce the act should prove such warning to have been given." *Willard* v. *Killingworth*, 8 Conn. 247, 254.

There is nothing in the later decisions of that court, which tends to shake the rules thus established.

In *Brownell* v. *Palmer*, 22 Conn. 107, the vote of the town,

which was presumed to be valid, without proof of the warning, was a vote passed at an annual meeting twenty-five years before, accepting a discontinuance in due form by the selectmen of an ancient highway, which was proved to have been disused ever since some time before that vote, and which there was strong ground therefore for presuming to have been discontinued. See *Avery* v. *Stewart*, 1 Cush. 496; *Fletcher* v. *Fuller*, 120 U. S. 534. In the case of a recent vote, the rule is otherwise. For instance, in *State* v. *Taff*, 37 Conn. 392, a vote of a town, fifteen years before, accepting the laying out of a highway by the selectmen, was held insufficient for want of any proof of the warning; and the highway was established upon the independent ground of dedication.

In *Isbell* v. *New York & New Haven Railroad*, 25 Conn. 556, the town clerk's record of the meeting at which the by-law in question was passed recited that the meeting was "legally warned and held for the purpose of making a by-law" upon the particular subject; and the case was thus reconciled with that of *Willard* v. *Killingworth*, above cited. The record made by the clerk in the performance of his legal duty was sufficient, and perhaps conclusive, evidence of the fact recorded. *Thayer* v. *Stearns*, 1 Pick. 109.

In *Society for Savings* v. *New London*, 29 Conn. 174, the sufficiency of the warning was not questioned.

In *Baldwin* v. *North Branford*, 32 Conn. 47, a vote passed upon an insufficient warning, and therefore invalid, was upheld because it had been ratified by the town at a subsequent meeting duly warned and held under a confirmatory act of the legislature.

The two remaining Connecticut cases, cited at the bar, were suits to compel towns to guarantee the bonds of a railroad corporation, in accordance with votes passed under authority conferred by statute.

In the one, the vote was passed at a meeting duly warned and held; and the decision was that the vote, as recorded by the town, taken in connection with the warning, which was also recorded, appeared to have been taken by ballot, as required by law, and that the town was estopped to show, by an

amendment of the record, made after the railroad corporation and its contractors had acted upon the vote for three years, that the vote was not so taken. *New Haven, Middletown & Willimantic Railroad* v. *Chatham*, 42 Conn. 465. The case is an exceptional one, depending on its peculiar circumstances. Dillon Mun. Corp. § 164, note.

But in the other case, in which the warning, as recorded, showed that it had been posted less than the requisite number of days before the meeting at which the town voted to guarantee the bonds on certain conditions, it was adjudged that the vote was invalid; and that the town was not estopped to prove the defect in the warning, and the consequent invalidity of the vote, by a recital in the record that the vote was passed at a meeting "legally warned and held," or by subsequent proceedings, after the railroad corporation had substantially complied with those conditions, by which the town, under a warning to determine what disposition should be made of the bonds of the railroad corporation held by the town, and to pay interest on its bonds, and to take such action as to secure the completion of the railroad, voted to let the conditions of the former vote remain as they were. The court said, "The assembled voters are without power to act for or bind the town, unless they have been called together in the statutory way and at the statutory time;" and also, after observing that "every voter who read the call" for the second meeting "might safely absent himself from the meeting in the certainty that under the call it could not impose the burden of a guarantee upon the town," added, "We cannot order the town to guarantee any bonds, unless it is made clear that at a lawful meeting, so called as to give the voters full knowledge of its purpose, they have assumed the burden; it is not to be placed upon them by inference." *Brooklyn Trust Co.* v. *Hebron*, 51 Conn. 22, 29, 30.

It follows that the vote passed at the annual meeting of the town of Bloomfield in 1868, purporting to authorize the town treasurer to borrow money for the use of the town, was invalid, for want of any evidence that the subject was specified in the warning. The statement in the record of the meeting,

that it was "legally warned," shows only that it had been duly warned for some purposes, not for what purposes.

The Circuit Court ruled that this vote did not of itself authorize the treasurer to borrow money; but submitted the vote, with the other evidence in the case, to the jury, as sufficient to authorize them to find either that the town had made him its general agent to borrow money, or that it had ratified his acts, or that it was estopped to deny their validity.

That evidence consisted only, 1st. Of forty-four notes made by the treasurer to sundry individuals after the passage of that vote; 2d. Of the reports made in print by the selectmen and treasurer to the annual meetings of the town from 1869 to 1878 inclusive, showing various sums received or paid "on town notes," and a gradually increasing "indebtedness of the town by notes;" and the records of those meetings, showing that in 1869 such reports were "read and accepted," and that in after years no action on them was taken by the town; 3d. Of a vote passed by the town in 1880, authorizing the selectmen to make notes in behalf of the town to take up and cancel certain memoranda of indebtedness, made by officers of the town, dated July 1, 1879, for money lent to the town by various persons; and the acts of the selectmen pursuant to that vote.

Any ratification of an act previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. *Owings* v. *Hull*, 9 Pet. 607; *Bennecke* v. *Insurance Co.*, 105 U. S. 355. And no estoppel in pais can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely and act upon. *Burgess* v. *Seligman*, 107 U. S. 20; *Scovill* v. *Thayer*, 105 U. S. 143; *Brant* v. *Virginia Co.*, 93 U. S. 326.

The vote of those who attend a town meeting being of no validity against the town or its inhabitants, unless the object of the vote is set forth in the notice or warning of the meeting, the town can no more ratify an act afterwards, than authorize it beforehand, except by vote passed pursuant to a previous notice specifying the object. Without the indispensable prerequisite of such a notice, those present at a town

meeting have no greater power to bind the town indirectly by ratification or estoppel, than they have to bind it directly by an original vote. *Marsh* v. *Fulton County*, 10 Wall. 676; *Daviess County* v. *Dickinson*, 117 U. S. 657; *Norton* v. *Shelby County*, 118 U. S. 425; *Pratt* v. *Swanton*, 15 Vt. 147; *Lander* v. *Smithfield School District*, 33 Maine, 239; *American Tube Works* v. *Boston Machine Co.*, 139 Mass. 5.

By the statutes of Connecticut, it is made the duty of the selectmen to superintend the concerns of the town, to adjust and settle all claims against it, and to draw orders on the treasurer for their payment, to keep a true and regular account of all the expenditures of the town, and to exhibit the same at the annual meeting; and it is the duty of the treasurer to receive all the money belonging to the town for taxes, fines, forfeitures, debts or otherwise, and to make an annual statement of the receipts of money into the treasury, and the expenditures, which shall be adjusted by the selectmen, and laid before the town at the annual meeting. Rev. Stats. 1866, tit. 7, §§ 45, 67; 1821, tit. 103, § 8, tit. 105, § 20. But neither the selectmen nor the treasurer have any general power to make contracts, to borrow money, or to incur new debts, in behalf of the town, except for particular objects having no relation to this case. *Sharon* v. *Salisbury*, 29 Conn. 113; *Ladd* v. *Franklin*, 37 Conn. 53; *Goff* v. *Rehoboth*, 12 Met. 26.

The reports made by the selectmen and the treasurer to the annual meetings, in performance of the duties imposed upon those officers by statute, were not, unless expressly approved or acted on by the town at a meeting duly held upon sufficient warning, evidence to charge the town with liability for debts which those officers had no authority to contract. The only reports of the selectmen and treasurer upon which the town took any action were those of 1869. The acceptance by the town of those reports might be a ratification of the debts and payments therein stated, but could have no further effect. *Burlington* v. *New Haven & Northampton Co.*, 26 Conn. 51; *Benoit* v. *Conway*, 10 Allen, 528; *Dickinson* v. *Conway*, 12 Allen, 487; *Arlington* v. *Pierce*, 122 Mass. 270; *Bean* v. *Hyde Park*, 143 Mass. 245. In *Kinsley* v. *Norris*, 60 N. H.

131, cited for the plaintiff, the town, under an appropriate article in the warrant, had voted not only to accept the report of the doings of an agent, but also to give him additional powers.

There is nothing in the case at bar, which tends to show that any of the promissory notes to individuals, offered in evidence, or of the notes mentioned in the annual reports of the selectmen and treasurer accepted by the town in 1869, or in the vote of the town in 1880, were held by the plaintiff. The bill of exceptions explicitly states that no evidence was offered that the town in town meeting assembled knew that its treasurer kept his bank account with the plaintiff, or was borrowing of the plaintiff the money represented by the notes in suit, or by notes of which these were renewals; and also states that the plaintiff disclaimed any advantage by virtue of being the indorsee, instead of being the payee, of the notes in suit.

The bill of exceptions does state that it appeared by the evidence that the plaintiff, from the beginning of its account with Mills as treasurer, "supposed or thought that Mills was authorized to borrow money for the use of the town and give its notes therefor." But it contains nothing tending to show that the supposition was based upon anything but false representations of the treasurer, which would not bind the town. *Railroad Bank* v. *Lowell*, 109 Mass. 214; *Agawam Bank* v. *South Hadley*, 128 Mass. 503. Nor was there any evidence that the plaintiff, at the time of lending money to the treasurer, knew of any acts of the town or of the selectmen since the vote of 1868; and the vote of 1880, and the acts of the selectmen under it, took place after the notes in suit had been made and delivered to the plaintiff, and therefore could not have influenced it in taking them.

Upon the whole case, there was no proof of original authority, or of subsequent ratification, or of estoppel, to bind the defendant town; none of original authority, for want of any vote passed pursuant to due notice in the warning; none of ratification, for the same reason, as well as because it was not shown that the acts proved were done with intent to ratify the acts of the treasurer in issuing the notes sued on, or with

knowledge of all the material facts attending their issue; none of estoppel, because there was no evidence of any acts of the town, which the plaintiff had a legal right to rely upon, or did in fact rely upon, in taking these notes. The jury having been instructed otherwise, the

Judgment must be reversed, and the case remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

MERCANTILE BANK *v.* NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued March 11, 12, 1887. — Decided April 4, 1887.

The main purpose of Congress in fixing limits to state taxation on investments in shares of national banks was, to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of like character.

The term "moneyed capital," as used in Rev. Stat. § 5219, respecting state taxation of shares in national banks, embraces capital employed in national banks, and capital employed by individuals when the object of their business is the making of profit by the use of their moneyed capital as money — as in banking as that business is defined in the opinion of the court; but it does not include moneyed capital in the hands of a corporation, even if its business be such as to make its shares moneyed capital when in the hands of individuals, or if it invests its capital in securities payable in money.

The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

Although trust companies created under the laws of New York are not banks in the commercial sense of the word, shares in such companies are moneyed capital in the hands of individuals: but as these companies are taxed upon the value of their capital stock, with deductions on account of property in which it is invested either otherwise taxed or not taxable, and are additionally taxed upon their income by way of

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franchise tax, it does not appear that the rate of taxation thus imposed by the laws of New York is less than that upon shares in national banks.

Deposits in savings banks are exempted from state taxation for just reasons, and, as the exemption does not operate as an unfriendly discrimination against investments in national bank shares, it cannot affect the rule for the taxation of the latter.

The amount of bonds of the city of New York which are exempt from taxation under state laws is too small, as compared with the whole amount of personal property and credits which are the subject of taxation, to affect, under Rev. Stat. § 5219, the validity of an assessment.

The bonds of municipal corporations are not within the reason of the rule established by Congress for the taxation of national banks.

THE bill in this case was filed by the appellant, an association organized as a national bank, in the city of New York, the object and prayer of which were to restrain the collection of taxes assessed upon its stockholders in respect to their shares therein, on the ground that the taxes assessed and sought to be collected by the defendants were illegal and void under § 5219 of the Revised Statutes of the United States, as being at a greater rate than those assessed under the laws of New York upon other moneyed capital in the hands of the individual citizens of that state. The assessment in question was made for the year 1885, by the proper officer, acting in pursuance of § 312 of an act of the legislature of the State of New York, passed July 1, 1882, entitled "An act to revise the statutes of this state relating to banks, banking and trust companies," which reads as follows:

"SEC. 312. The stockholders in every bank or banking association organized under the authority of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholders in the assessment of taxes at the place, city, town or ward where such bank or banking association is located, and not elsewhere, whether the said stockholders reside in said place, city, town or ward or not; but in the assessment of said shares, each stockholder shall be allowed all the deductions and exceptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this State, and the

assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. In making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. Nothing herein contained shall be held or construed to exempt the real estate of banks or banking associations from either State, county or municipal taxes, but the same shall be subject to State, county, municipal and other taxation to the same extent and rate, and in the same manner according to its value, as other real estate is taxed. The local authorities charged by law with the assessment of the said shares shall, within ten days after they have completed such assessment, give written notice to each bank or banking association of such assessment of the shares of its respective shareholders, and no personal or other notice to such shareholders of such assessment shall be necessary for the purpose of this act."

The hearing in the Circuit Court was had upon an agreed statement of facts, as follows:

"It is hereby stipulated and agreed by and between the parties to the above entitled suit, that, for the purpose of the trial of this cause, the facts hereinafter stated are true, and that the cause be submitted for trial and decree upon such statement alone, together with the pleadings:

"1. That the complainant, on the second Monday of January, A.D. 1885, and for several months prior thereto, had a capital stock of the par value of $1,000,000 and a surplus fund of $200,000; that nearly the whole of said capital and surplus fund was, during that period, invested in bonds of the United States of the par value of $949,000, and of a market value and cost largely exceeding that sum; that its shares of stock were each of the par value of $100 and of the number of 10,000, and were then held by 142 persons and corporations, 50 of whom, owning 1877 shares, were residents of states

other than the State of New York, and the remainder residents of the State of New York.

"2. That, on the second Monday of January, 1885, the proper tax officers of the city of New York, acting under c. 409 of the laws of 1882 of the State of New York, did value and assess for taxation the shares of stock of said bank against the individual shareholders thereof, at the rate of $89 per share, after deducting the proportion of the assessed value of the real estate of said bank applicable to each share of stock, as by law required, making the total gross valuation of said shares in the hands of the shareholders the sum of $890,000, from which sum the debts of sundry indebted stockholders, amounting to $89,128, were deducted, as by law allowed, leaving the total valuation of said shares against said stockholders upon which taxes were thereafter assessed the sum of $800,872.

"3. That, on the second Monday of January, 1885, the aggregate actual value of the shares of stock of the incorporated moneyed and stock corporations incorporated by the laws of the State of New York deriving an income or profit from their capital or otherwise (not including life insurance companies, trust companies, banks, or banking associations, organized under the authority of this state or of the United States) amounted to the sum of $755,018,892; that 'Exhibit A,' hereto appended and made a part of this agreement, contains a list of the corporations whose shares of capital stock are embraced in said sum of $755,018,892, and also shows the total par value of the shares of capital stock of each of said corporations.

"4. That, at the period aforesaid, the aggregate actual value of the shares of stock of the life insurance companies incorporated under the laws of this state amounted to the sum of $3,540,000, and at the same period the aggregate value of the personal property of said companies, consisting of mortgages, loans with collateral security, state, county, and municipal bonds, and railroad bonds and shares of stock of corporations (but not including the bonds of the United States nor the shares of corporations created by the State of New York),

amounted to $195,257,305; all of which is shown in detail in the schedule hereto annexed, marked 'Exhibit B.'

"5. That, at the said period, the aggregate actual value of the shares of the capital stock of the trust companies existing in the State of New York and organized under its laws amounted to $32,018,900, as is shown in detail in the schedule hereto annexed, marked 'Exhibit C,' of which sum the amount of $30,215,900 was of trust companies located in the city of New York.

"6. That, at the same period, the aggregate actual value of the deposits due by the savings banks of this state to depositors was $437,107,501 (not including the surplus accumulated by the said corporations, amounting to $68,669,001).

"7. That the aggregate actual value of the bonds and stocks issued by the city of New York, subject to the provisions of c. 552 of the laws of 1880, at the said period, amounted to $13,467,000.

"8. That the aggregate actual value at the same period of the shares of stock of corporations created by states other than the State of New York, owned by the citizens of the State of New York, amounted to at least the sum of $250,000,000.

"9. The assessed valuation of all personal property, after making the deductions allowed by law, in the city of New York (at the said period), as shown by the annual record of the assessed valuation of real and personal estate of the said city for the year 1885, was $202,673,806. This sum included the capital of corporations, (after making deductions for investments thereof in real estate, shares of New York corporations, taxable upon their capital stock under the laws of this state, and non-taxable securities,) as follows:

Insurance companies	$2,146,379
Trust companies	156,506
Miscellaneous companies	29,234,409
Railroad companies	12,339,871

"It also included:

Shares of national banks	45,046,074
Shares of state banks	15,700,220

Statement of Facts.

"The sum so deducted for the value of the real estate belonging to said trust companies located in the city of New York did not exceed $2,336,572.31.

The assessed value of the real estate in said city for said period is	$1,168,443,137
And in the said state, including the city of New York, is	2,761,973,845
The latter sum including the sum of about .	340,000,000

being the assessed value of the real estate located in said state belonging to corporations.

"The 'aggregate amount of the taxable personal estate' within the State of New York, exclusive of said city, after deducting debts due by the owners thereof for the year ending December 31, 1884, as assessed by the assessors and returned to the state comptroller, is $151,632,369.

"This sum included the capital of corporations, (after making the deductions for investments thereof in real estate, shares of New York corporations taxable upon their capital stock under the laws of this state, and non-taxable securities,) of the amount of $34,466,612.

The aggregate capital stock, taken at par, of the national banks outside of the city of New York, but within the State of New York, on December 20, 1884, as shown by the report of the Comptroller of the Currency of the United States, was	$36,804,160
And that of state banks, outside of the said city, but within said state, as shown by the report of the bank superintendent of New York, is .	8,128,000
Total (outside of New York City) . .	$44,932,160
The total par value of the shares of national banks in said state, including the city of New York, for the period aforesaid, is	$83,054,160
And of the state banks	32,815,700

"10. That it is the intention of the defendants, unless restrained by injunction, to collect the said tax levied by them

against the shareholders of the said complainant upon said shares by the use of all needful legal process.

"11. That any statutes of the United States or of the State of New York may be cited and relied upon before the said court as if herein fully set forth."

From a decree dismissing the bill the present appeal was prosecuted.

Mr. Charles W. Wells (with whom was *Mr. Frederick W. Whitridge* and *Mr. Willard Brown*), for appellant, cited: *Hepburn* v. *School Directors*, 23 Wall. 480; *Adams* v. *Nashville*, 95 U. S. 19; *People* v. *Weaver*, 100 U. S. 539; *Cummings* v. *National Bank*, 101 U. S. 153; *Evansville Bank* v. *Britton*, 105 U. S. 322; *Boyer* v. *Boyer*, 113 U. S. 689; *First Nat. Bank of Utica* v. *Waters*, 7 Fed. Rep. 152; *Stratton* v. *Collins*, 43 N. J. Law (14 Vroom), 562; *McMahon* v. *Palmer*, 102 N. Y. 176; *Van Allen* v. *The Assessors*, 3 Wall. 573; *Farrington* v. *Tennessee*, 95 U. S. 679; *Sturges* v. *Carter*, 114 U. S. 511; *New Orleans* v. *Houston*, 119 U. S. 265; *Albany City Nat. Bank* v. *Maher*, 6 Fed. Rep. 417; *Commonwealth* v. *Hamilton Co.*, 12 Allen, 298; *People* v. *Barton*, 29 How. Pr. 371; *Porter* v. *Railroad Co.*, 76 Ill. 561; *Bradley* v. *The People*, 4 Wall. 459; *People* v. *Commissioners*, 4 Wall. 244; *People ex rel. &c.* v. *Davenport*, 91 N. Y. 574; *People ex rel. &c.* v. *Beers*, 67 How. Pr. 219; *People* v. *Mechanics' Savings Institution*, 92 N. Y. 7; *People ex rel. Trowbridge* v. *Commissioners*, 4 Hun, 595; *People ex rel. Pac. Mail Steamship Co.* v. *Commissioners*, 5 Hun, 200.

Mr. James C. Carter, for appellee, cited: *Boyer* v. *Boyer*, 113 U. S. 689; *Van Allen* v. *The Assessors*, 3 Wall. 573; *People* v. *Commissioners*, 4 Wall. 244; *Nat. Exchange Bank* v. *Wells*, 18 Blatchford, 478; *People* v. *Weaver*, 100 U. S. 539; *Tennessee* v. *Whitworth*, 117 U. S. 129; *First Nat. Bank of Utica* v. *Waters*, 19 Blatchford, 239; *Evansville Bank* v. *Britton*, 105 U. S. 322; *Oswego Starch Factory* v. *Dolloway*, 21 N. Y. 449; *People ex rel. &c.* v. *Commissioner of Taxes*, 95 N. Y. 554; *People ex rel. &c.* v. *Davenport*, 91

N. Y. 574; *People* v. *Fire Association*, 92 N. Y. 311; *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665; *Adams* v. *Nashville*, 95 U. S. 19; *Hepburn* v. *School Directors*, 23 Wall. 480.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

Section 5219 of the Revised Statutes of the United States is as follows:

"Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

In the present case no question is raised by the appellant as to the validity of § 312, c. 409, of the Laws of New York of 1882, considered by itself, nor in reference to the rule of valuation or assessment which it prescribes. No exception is taken to the form of the assessment, nor is the case based in any degree upon the dereliction of the assessing officers in the discharge of their duties, there being no allegation and no proof that they have not performed their whole duty under the statutes of the State.

The proposition which the appellant seeks to establish is, that the State of New York, in seeking to tax national bank shares, has not complied with the condition contained in

§ 5219 of the Revised Statutes, that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, "in that, it has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000), and state bank shares (having a like value of $22,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank." This exemption, it is claimed, is of a "very material part relatively" of the whole, and renders the taxation of national bank shares void.

The exemptions thus referred to are classified as follows:

1st. The shares of stock in the hands of the individual shareholders of all incorporated "moneyed or stock corporations deriving an income or profit from their capital or otherwise, incorporated by the laws of New York, not including trust companies and life insurance companies, and state or national banks." The value of such shares, it is admitted, amounts to $755,018,892.

2d. Trust companies and life insurance companies. The actual value of the shares of stock in trust companies amounts to $32,018,900, and the actual value of the shares in life insurance companies amounts to $3,540,000, which life insurance companies, it is admitted, are the owners of personal property consisting of mortgages, loans, stocks, and bonds to the value of $195,257,305.

3d. Savings banks and the deposits therein. The deposits amount to $437,107,501, and an accumulated surplus to $68,669,001.

4th. Certain municipal bonds issued by the city of New York under an act passed in 1880, of the value of $13,467,000.

5th. Shares of stocks in corporations created by states other than New York, in the hands of individual holders, residents of said state, amounting to $250,000,000.

It is argued by the appellant that these exemptions bring

the case within the decision of *Boyer* v. *Boyer*, 113 U. S. 689. In that case, referring to the legislation of Pennsylvania, it was said: "The burden of county taxation imposed by the latter act has at all events been removed from all bonds or certificates of loan issued by any railroad company incorporated by the State; from shares of stock in the hands of stockholders of any institution or company of the State which in its corporate capacity is liable to pay a tax into the State treasury under the act of 1859; from mortgages, judgments, and recognizances of every kind; from moneys due or owing upon articles of agreement for the sale of real estate; from all loans, however made, by corporations which are taxable for state purposes when such corporations pay into the State treasury the required tax on such indebtedness."

This enumeration of exempted property, the amounts of which were stated in the bill and admitted by the demurrer, was held to include such a material portion relatively of the moneyed capital in the hands of individual citizens as to make the tax upon the shares of national banks an unfair discrimination against that class of property, but no attempt was made in the opinion of the court to define the meaning of the words "moneyed capital in the hands of individual citizens" as used in the statute, or to enumerate all the various kinds of property or investments that came within its description, or to show that shares of stock in the hands of stockholders of every institution, company, or corporation of a state, having a capital employed for the purpose of earning dividends or profits for its stockholders, were taxable as moneyed capital in the hands of individual citizens.

It is accordingly contended on behalf of the appellees in the present case, 1st, that the shares of stock in the various companies incorporated by the laws of New York as moneyed or stock corporations, deriving an income or profit from their capital or otherwise, including trust companies, life insurance companies, and savings banks, are not moneyed capital in the hands of the individual citizen within the meaning of the act of Congress; 2d, that if any of them are, then the corporations themselves are taxed under the laws of New York in such a

manner and to such an extent that the shares of stock therein are in fact subject to a tax equal to that which is assessed upon shares of national banks; and 3d, that if there are any exceptions, they are immaterial in amount and based upon considerations which exclude them from the operation of the rule of relative taxation intended by the act of Congress.

In view of the nature of the contention between the parties to this suit, and the extent and value of the interests involved, it becomes necessary to review with care the previous decisions of this court upon the same subject, and to endeavor to state with precision the rule of relative taxation prescribed to the states by Congress on shares of national banks.

The national banking act of 1864, 13 Stat. 111, in addition to the restrictions now imposed upon the state taxation of national bank shares, declared "that the tax so imposed, under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State, where such association is located." In the reënactment of this statute in 1868, 15 Stat. 34, this proviso was omitted. The case of *Van Allen* v. *The Assessors*, 3 Wall. 573, was decided under the act of 1864 as originally enacted. In that case, the taxing law of New York, which was in question, was held to be invalid, because it levied no taxes upon shares in state banks at all, the tax being assessed upon the capital of the banks after deducting that portion which was invested in securities of the United States; and it was held that this tax on the capital was not a tax on the shares of the stockholders equivalent to that on the shares in national banks. It was also decided in that case that it was competent for the states, under the permission of Congress, to tax the shares of national bank stock held by individuals, notwithstanding the capital of the bank was invested in bonds of the United States which were not subject to taxation.

It appears, therefore, as the result of the decision in that case, that a tax upon the capital of a state bank, levied upon the value thereof, after deducting such part as was invested in non-taxable government bonds, was less than an equivalent

for a tax upon the shares of national banks from which no such deduction was permitted. Accordingly, in the case of *People* v. *Commissioners*, 4 Wall. 244, the complaint was made on behalf of individual owners of national bank stock taxed in New York, that no deduction was permitted to them from the value of their shares on account of the capital of the bank being invested in non-taxable government bonds, while such deduction was allowed in favor of insurance companies and individuals in the assessment for taxation of the value of their personal property; and it was contended, therefore, that the relators in that case were taxed upon their shares of national bank stock at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens. In reference to this supposed inequality the court said: "The answer is, that, upon a true construction of this clause of the act, the meaning and intent of the law-makers were, that the rate of taxation of the shares should be the same or not greater than upon the moneyed capital of the individual citizen, which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens. This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the state, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that in every well-regulated and enlightened state or government, certain descriptions of property and also certain institutions, — such as churches, hospitals, academies, cemeteries, and the like, — are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform" (p. 256). The court then proceeded to show that the exclusion, as the subject of taxation, of government securities held by individuals, from their moneyed capital, was by authority of the United States, and hence it would be a contradiction to infer that Congress meant to include the same government securities

as a part of that moneyed capital which it required to be taxed by the states at a rate equal to that imposed by the latter upon the shares held by individuals of national bank stock.

The other objection taken to the validity of the tax complained of was, that insurance companies created under the laws of the state were authorized to deduct from the amount of their capital and surplus profits, for purposes of taxation, such part as was invested in United States securities. In reference to this the court said: "The answer is, that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is, confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but even if they were, the answer we have already given to the deduction of these securities in the assessment of the property of individual citizens is equally applicable to them" (p. 257).

In *Lionberger* v. *Rouse*, 9 Wall. 468, it was held that the proviso originally contained in the act of 1864, and omitted from the act of 1868, expressly referring to state banks, was limited to state banks of issue. The court said (p. 474): "There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of national bank circulation." Of course, so far as investments in such banks are moneyed capital in the hands of individuals, they are included in the clause as it now stands.

In the case of *Hepburn* v. *School Directors*, 23 Wall. 480, it was decided to be competent for the state to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided thereby they were not taxed at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the State. It was a further question in that case whether the exemption from taxation by statute of "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate" made the taxation of shares in national banks unequal and invalid. This was decided in the negative

on the two grounds, 1st, that the exemption was founded upon the just reason of preventing a double burden by the taxation both of property and of the debts secured upon it; and, 2d, because it was partial only, not operating as a discrimination against investments in national bank shares. The court said: "It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt" (p. 485).

The subject was further considered in the case of *Adams* v. *Nashville*, 95 U. S. 19. One of the questions in that case had reference to an exemption from taxation by state authority of interest-paying bonds issued by the municipal corporation of the city of Nashville, in the hands of individuals. It was held that the exemption did not invalidate the assessment upon the shares of national banks. The court said (p. 22): "The act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so. Homesteads to a specified value, a certain amount of household furniture, (the six plates, six knives and forks, six teacups and saucers of the old statutes,) the property of clergymen to some extent, school-houses, academies and libraries are generally exempt from taxation. The discretionary power of the legislatures of the states over all these subjects remains as it was before the act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the states in the exercise of their taxing power."

In *People* v. *Weaver*, 100 U. S. 539, it was held that the prohibition against the taxation of national bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens could not be evaded by the assessment of equal rates of taxation upon unequal valuations, and that consequently where the state statute authorized individuals to deduct the amount of debts owing by them from

the assessed value of their personal property and moneyed capital subject to taxation, the owners of shares of national banks were entitled to the same deduction. The cases of *The Supervisors* v. *Stanley*, 105 U. S. 305; *Hills* v. *Exchange Bank*, 105 U. S. 319; *Evansville Bank* v. *Britton*, 105 U. S. 322; and *Cummings* v. *National Bank*, 101 U. S. 153, are applications of the same principle.

The rule of decision in *Van Allen* v. *Assessors*, 3 Wall. 573, is not inconsistent with that followed in *People* v. *The Commissioners*, 4 Wall. 244. In the former of these cases the comparison was between taxes levied upon the shares of national banks and taxes levied upon the capital of state banks. In the valuation of the capital of state banks for this taxation, nontaxable securities of the United States were necessarily excluded, while in the valuation of shares of national banks no deduction was permitted on account of the fact that the capital of the national banks was invested in whole or in part in government bonds. The effect of this was, of course, to discriminate to a very important extent in favor of investments in state banks, the shares in which *eo nomine* were not taxed at all, while their taxable capital was diminished by the subtraction of the government securities in which it was invested, and against national bank shares taxed without such deduction at a value necessarily and largely based on the value of the government securities in which by law a large part of the capital of the bank was required to be invested. In the case of *People* v. *The Commissioners*, the comparison was not between the taxation of shareholders in national banks and of shareholders in state banking institutions, but between the taxation of national bank shares and that of personal property held by individuals and insurance companies, from the valuation of which the deduction was permitted of the amount of nontaxable government securities held by them respectively. The general ground of the decision was, that the exemption was not an unfriendly discrimination against investments in national banks in favor of other investments of a similar and competing character. It was held that the exemption under state authority, of United States securities, which it was not lawful for the

state to tax, could not be considered an unwarranted exemption in that case. It was also held that the language of the act of Congress which fixed the rate of taxation upon national bank shares, by reference to that imposed by the State "upon other moneyed capital in the hands of individual citizens," excluded from the comparison moneyed capital in the hands of corporations, unless the corporations were of that character, such as state banks were held to be in the case of *Van Allen* v. *The Assessors*, that shares of stock in them fell within the description of "moneyed capital in the hands of individual citizens." In that way a distinction was established between shares of stock held in banking corporations and those held in insurance companies and other business, trading, manufacturing and miscellaneous corporations, whose business and operations were unlike those of banking institutions.

It follows, as a deduction from these decisions, that "moneyed capital in the hands of individual citizens" does not necessarily embrace shares of stock held by them in all corporations whose capital is employed, according to their respective corporate powers and privileges, in business carried on for the pecuniary profit of shareholders, although shares in some corporations, according to the nature of their business, may be such moneyed capital. The rule and test of this difference is not to be found in that quality attached to shares of stock in corporate bodies generally whereby the certificates of ownership have a certain appearance of negotiability, so as easily to be transferred by delivery under blank powers of attorney, and to be dealt in by sales at the stock exchange, or used as collaterals for loans, as though they were negotiable security for money. This quality, in a greater or less degree, pertains to all stocks in corporate bodies, the facility of their use in this way being in proportion to the estimated wealth and credit, present or prospective, of the corporation itself. Neither is the difference to be determined by the character of the investments in which, either by law or in fact, the bulk of the capital and the accumulated surplus of the corporation is from time to time invested. It does not follow, because these are invested in such a way as properly to constitute moneyed capi-

tal, that the shares of stock in the corporations themselves must necessarily be within the same description. Such is the case of insurance companies, in respect to which it was held, in *People* v. *The Commissioners*, that shares of stock in them were not taxable as "moneyed capital in the hands of individual citizens;" and that the language of the act of Congress does not include moneyed capital in the hands of corporations. The true test of the distinction, therefore, can only be found in the nature of the business in which the corporation is engaged.

The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing those limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be

invested and employed by individual citizens in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy.

Applying this rule of construction, we are led, in the first place, to consider the meaning of the words "other moneyed capital," as used in the statute. Of course it includes shares in national banks; the use of the word "other" requires that. If bank shares were not moneyed capital, the word "other" in this connection would be without significance. But "moneyed capital" does not mean all capital the value of which is measured in terms of money. In this sense, all kinds of real and personal property would be embraced by it, for they all have an estimated value as the subjects of sale. Neither does it necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations, are represented by certificates showing that the owner is entitled to an interest, expressed in money value, in the entire capital and property of the corporation, but the property of the corporation which constitutes its invested capital may consist mainly of real and personal property, which, in the hands of individuals, no one would think of calling moneyed capital, and its business may not consist in any kind of dealing in money, or commercial representatives of money.

So far as the policy of the government in reference to national banks is concerned, it is indifferent how the States may choose to tax such corporations as those just mentioned, or the interest of individuals in them, or whether they should be taxed at all. Whether property interests in railroads, in manufacturing enterprises, in mining investments, and others of that description, are taxed or exempt from taxation, in the contemplation of the law, would have no effect upon the success of national banks. There is no reason, therefore, to suppose that Congress intended, in respect to these matters, to interfere with the power and policy of the States. The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute "moneyed capital." Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress. That the words of the law must be so limited appears from another consideration; they do not embrace any moneyed capital in the sense just defined, except that in the hands of individual citizens. This excludes moneyed capital in the hands of corporations, although the business of some corporations may be such as to make the shares therein belonging to individuals moneyed capital in their hands, as in the case of banks. A railroad company, a mining company, an insurance company, or any other corporation of that description, may have a large part of its capital invested in securities payable in money, and so may be the owners of moneyed capital; but, as we have already seen, the shares of stock in such companies held by individuals are not moneyed capital.

The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. Accordingly, it was said in *Evansville Bank* v. *Britton*, 105 U. S. 322: "The act of Congress does not make the tax on personal property the measure of the tax on the bank shares in the State, but the tax on moneyed capital in the hands of the individual citizens. Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands, and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way."

This definition of moneyed capital in the hands of individuals seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy.

From this view, it follows that the mode of taxation adopted by the State of New York in reference to its corporations, excluding for the present trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

This is the conclusion reached on similar grounds by the Court of Appeals of New York. In the case of *McMahon* v. *Palmer*, 102 N. Y. 176, that court said: "Our system of laws with reference to the taxation of incorporated companies and capital invested therein, has been carefully framed with a view of reaching all taxable property and subjecting it to equality of burden, so far as that object is attainable in a matter so complex. In view of the wide variation in the employable value of such investments and the frequent mutations in their condition, it is by no means certain that this object has not been attained with reasonable accuracy. It is quite clear, from even this cursory review of the statutes, that if any discrimination is made by our laws in taxing capital invested, it is not to the prejudice of that employed in banking corporations. Even if this were not the result of the statute, we are of opinion that investments in the shares of the companies named do not come within the meaning of that clause in the Federal statutes, referring to other moneyed capital in the hands of individuals. That phrase, as generally employed, distinguishes such capital from other personal property, and investments in the various manufacturing and industrial enterprises. And this is the sense in which it is used in our tax laws, as appears by reference to the statutes."

The cases of trust companies and savings banks require separate consideration. Section 312 of c. 409 of the act of 1882 is a reënactment of § 3 of c. 596 of the Laws of 1880, except that in the latter, trust companies were included with banks and banking institutions, so as to subject the stockholders therein to the same rule of assessment and taxation on the value of their shares of stock. The present statute omits them from the corresponding section. The consequence is, that trust companies are taxable, as other corporations under the act of 1857, for local purposes, upon the actual value of their capital stock. By c. 361 of the Laws of 1881, as amended, they are subjected to a franchise tax, in the nature of an income tax, payable to the state for state purposes. It is argued, from this legislation, in reference to the taxation of trust companies, that it discloses an

evident intent to discriminate in favor of the latter as between them and banks, including national banks; and it is argued that, considering the nature of the business in which trust companies are engaged, it is a material and unfriendly discrimination in favor of state institutions engaged to some extent in a competing business with that of national banks. Trust companies, however, in New York, according to the powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation or by any court of record; to receive the title to real or personal estate on trusts created in accordance with the laws of the state and to execute such trusts; to act as agent for corporations in reference to issuing, registering, and transferring certificates of stock and bonds, and other evidences of debt; to accept and execute trusts for married women in respect to their separate property; and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unincumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States or of the State of New York, or of the incorporated cities of that state.

It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce. They receive money on deposit, it is true, and invest it in loans, and so deal, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the act of Congress. But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon shares of stock in national banks.

It appears from the tax laws of New York applicable to the subject, as judicially construed by the Court of Appeals of that state, that the capital stock of such a corporation is to be assessed at its actual value. The actual value of the whole capital stock is ascertained by reference, among other standards, to the market price of its shares, so that the aggregate value of the entire capital may be the market price of one multiplied by the whole number of shares. *Oswego Starch Factory* v. *Dolloway*, 21 N. Y. 449; *The People* v. *The Commissioners of Taxes*, 95 N. Y. 554. From this are to be deducted, of course, the real estate of the corporation otherwise taxed, and the value of such part of the capital stock as is invested in non-taxable property, such as securities of the United States. In addition to this, the corporation, as already stated, pays to the state, as a state tax, a tax upon its franchise based upon its income; the tax on the capital being for local purposes.

It is evident, we think, that taxation in this mode is, at least, equal to that upon the shares of individual stockholders, for if the same property was held for the same uses and taxed by the same rule, in the hands of individuals, as moneyed capital, it would be subject to precisely the same deductions; in addition to which, the individual would be entitled to make a further deduction of any debts he might owe. Upon these grounds, therefore, we are of opinion that this mode of taxing trust companies does not create the inequality which the appellant alleges.

In the case of savings banks, we assume that neither the bank itself nor the individual depositor is taxed on account of the deposits. The language of the statute (§ 4, c. 456, Laws of 1857) is as follows: "Deposits in any banks for savings, which are due to the depositors, . . . shall not be liable to taxation, other than the real estate and stocks which may be owned by such bank or company, and which are now liable to taxation under the laws of this State."

According to the stipulation in this case, the deposits in such banks amount to $437,107,501, with an accumulated surplus of $68,669,001. It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within

the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. To promote their growth and progress is the obvious interest and manifest policy of the state. Their multiplication cannot in any sense injuriously affect any legitimate enterprise in the community. We have already seen that by previous decisions of this court it has been declared that "it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt;" *Hepburn* v. *School Directors*, 23 Wall. 480; and that "the act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property, if the legislature chose to do so." *Adams* v. *Nashville*, 95 U. S. 19. The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation.

It is further objected, on similar grounds, to the validity of the assessment complained of in this case, that municipal bonds of the city of New York, to the amount of $13,467,000, are

also exempted from taxation. The amount of the exemption in this case is comparatively small, looking at the whole amount of personal property and credits which are the subjects of taxation; not large enough, we think, to make a material difference in the rate assessed upon national bank shares; but, independently of that consideration, we think the exemption is immaterial. Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneyed capital, but as from their nature they are not ordinarily the subjects of taxation, they are not within the reason of the rule established by Congress for the taxation of national bank shares.

The same considerations apply to what is called an exemption from taxation of shares of stock of corporations created by other states and owned by citizens of New York, which it is agreed amount to at least the sum of $250,000,000. It is not pretended, however, that this exemption is based upon the mere will of the legislature of the State. The courts of New York hold that they are not the proper subjects of taxation in the State of New York, because they have no *situs* within the territory for that purpose. *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224; *People ex rel. Trowbridge* v. *The Commissioners*, 4 Hun, 595. The objection would be equally good if made to the non-taxation of real estate owned by citizens of New York, but not within its limits. Clearly the property to be taxed under the rule prescribed for the taxation of national bank shares must be property which, according to the law of the State, is the subject of taxation within its jurisdiction.

Upon these grounds, substantially the same as those on which the Circuit Judge proceeded, 28 Fed. Rep. 776, we are of opinion that the appellant is not entitled to the relief prayed for.

The decree of the Circuit Court is, therefore, *Affirmed.*

Mr. Justice Blatchford took no part in the decision of this case.

NEWARK BANKING COMPANY *v.* NEWARK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

Argued March 14, 15, 1887. — Decided April 4, 1887.

There is no material difference between this case and *Mercantile Bank* v. *New York City*, *ante*, 138, and on the authority of that case this is affirmed.

In equity. Decree below dismissing the bill. Complainant appealed. The case is stated in the opinion of the court.

Mr. Charles W. Wells and *Mr. John W. Taylor* for appellant.

Mr. Joseph Coult and *Mr. John R. Emery* for appellees.

Mr. Justice Matthews delivered the opinion of the court.

This is a bill in equity filed by the appellant, a national bank organized under the act of Congress, doing business in the city of Newark, New Jersey, the object and prayer of which are to enjoin the collection of taxes assessed upon the individual shareholders therein, on the ground that, according to the laws of New Jersey, under which the assessment has been made, the rate of taxation is greater than that assessed upon the moneyed capital in the hands of the individual citizens of the state. This alleged inequality, it is contended, results from certain exemptions authorized by the laws of New Jersey, whereby a material portion of the moneyed capital in the hands of individuals is freed from taxation.

According to the allegations of the bill, these exemptions consist, 1st, of the shares of capital stock held by individuals in all private corporations of the state, "except banking institutions, and except those which by virtue of any contract in their charters or other contracts with this state are expressly exempted from taxation, and except mutual life insurance

companies specially taxed," which exemptions, it is charged, amount to the sum of $301,485,000; and, 2d, of the deposits in savings banks, amounting to the sum of $24,017,916.99.

The 15th section of the act of April 11, 1866, establishing these exemptions, is as follows (Revision of 1877, p. 1156): "That all private corporations of this state, except banking institutions, and except those which by virtue of any contract in their charters or other contracts with this state are expressly exempted from taxation, and except mutual life insurance companies specially taxed, shall be and are hereby required to be respectively assessed and taxed at the full amount of their capital stock paid in, and accumulated surplus; but any real estate which such corporations may lawfully own in any other state than this state, shall not be liable to be estimated in such accumulated surplus, and the persons holding the capital stock of such corporations shall not be assessed therefor; and such corporations as have no capital stock other than those above excepted, shall be assessed for the full amount of their property and valuable assets, without any deductions for debts and liabilities; but depositors in savings banks, taxed by virtue of this section, shall be exempted from taxation on their personal estate to the amount of their deposits; provided, that premium notes held by life insurance companies shall in no case be considered as future premiums, but shall be included in the valuable assets of said company."

Under the statutory provision for the taxation of bank shares in New Jersey, the stock of every bank, national as well as state, is assessed for taxation in the place where the bank is located to all non-resident stockholders thereof, the taxes assessed on which are payable by the bank itself for their account; resident stockholders being taxed on their shares in the townships or wards in which they respectively reside. The rate of taxation is the same as that upon other personal property held by individuals, and is subject to deduction on account of debts due by the owner.

It is not claimed that the assessments complained of in this case are unequal or illegal, unless made so by the exemptions authorized by the 15th section of the act of April 11, 1866.

Statement of Facts.

There is no material difference between the legislation of New Jersey on this subject and that of New York, as considered in the case of *The Mercantile National Bank of the City of New York* v. *The Mayor, Aldermen and Commonalty of the City of New York, and George W. McLean, Receiver of Taxes*, just decided. This case is, therefore, necessarily governed by the decision in that.

The decree of the Circuit Court is accordingly

Affirmed.

Mr. Justice Bradley and Mr. Justice Blatchford took no part in the decision of this case.

CONCORD *v.* ROBINSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued March 24, 1887. — Decided April 4, 1887.

A grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment, does not authorize the issuing of negotiable bonds in payment of such appropriation.

The power given by the act of March 24, 1869, of the legislature of Illinois, relating to the Chicago, Danville and Vincennes Railroad, to townships, towns, and cities, which had voted to contribute aid in the construction of said road, to borrow money and issue bonds in payment of such contributions, if not acted upon prior to July 2, 1870, was withdrawn by the constitution of Illinois of 1870, and could not, thereafter, be exercised.

Subscriptions and donations in aid of railroads, voted by municipal corporations of Illinois, prior to July 2, 1870, such vote being authorized by laws in force when it was taken, could be completed after that date, according to the conditions attached to the vote, or upon terms that did not increase the public burdens, notwithstanding the provision in the constitution of 1870, that no municipality "shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation."

This was an action at law to recover on coupons attached to negotiable bonds issued by the plaintiff in error. A jury was

waived at the trial. Judgment for plaintiff. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Henry Decker for plaintiff in error. *Mr. Lewis H. Bisbee* and *Mr. John P. Ahrens* were with him on the brief.

Mr. George A. Sanders for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This is an action upon negotiable coupon bonds signed by the supervisor and clerk of the town of Concord, a municipal corporation existing under the township organization law of Illinois. They were executed in 1871. Each bond purports, upon its face, to have been "issued under and by virtue of a law of the State of Illinois to authorize cities, towns or townships within certain limits to appropriate moneys and levy a tax to aid the construction of the Chicago, Danville and Vincennes Railroad," and pledges the faith of the township for the payment of the principal and interest. The act here referred to was passed March 7, 1867. 1 Private Laws Ill. 1867, p. 842. It authorizes all incorporated towns and cities, and towns acting under the township organization law, within certain territorial limits, (which includes the town of Concord,) to appropriate such sum of money as they deem proper to the Chicago, Danville and Vincennes Railroad Company to aid in the construction of its road, "to be paid to said company as soon as the track of said road shall have been located and constructed through said city, town, or township, respectively;" provided, the appropriation is first sustained at the polls by a majority of the electors of the municipality. The act authorized and *required* the authorities of said townships, towns, or cities, respectively, "to levy and collect a tax, and make such provisions as may be necessary and proper for the prompt payment" of the appropriation. It neither expressly nor by implication invested the municipal corporations, embraced by its provisions, with the power to issue commercial paper in payment of an appropriation so voted. We held in

Claiborne County v. *Brooks*, 111 U. S. 400, 406, — which was decided after the judgment below was rendered, — that "mere political bodies, constituted as counties, are for the purpose of local police and administration, and having the power of levying taxes to pay all public charges created, . . . have no power or authority to make and utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some power expressly given, which cannot be fairly exercised without it." No such implication arises from the grant to a municipal corporation of power to appropriate moneys in aid of the construction of a railroad, accompanied by a provision directing the levy and collection of taxes to meet such appropriation, and prescribing no other mode of payment. *Wells* v. *Supervisors*, 102 U. S. 625, 631, 632; *Ogden* v. *County of Daviess*, 102 U. S. 634, 639. The provision in the act of 1867 that the money should be paid as soon as the road was located and constructed through the city, town, or township voting the appropriation, is inconsistent with the idea that such appropriation could be met, in the first instance, by negotiable bonds which might pass into the hands of *bona fide* holders for value, and become binding, whether the road was, or not, so located or constructed.

The clause requiring such provisions to be made as are necessary and proper for the prompt payment of the appropriation has reference only to the collection and application of taxes levied to meet the appropriation.

For these reasons the court erred in holding that the validity of the bonds was sustained by the act of March 7, 1867.

2. The suggestion, that the bonds were authorized by the act of February 26, 1869, 3 Private Laws Ill. 1869, p. 355, entitled "An act to legalize certain aids heretofore voted and granted to aid in the construction of the Chicago, Danville and Vincennes Railroad," is without force. That act, by its very terms, has reference only to aids voted and granted prior to its passage. The aid in the present case was voted subsequently.

3. Nor, in our judgment, can the bonds be sustained as valid obligations of the town by the provisions of the act of

March 24, 1869, 3 Private Laws Ill. 1869, p. 356, entitled "An act to enable towns, townships, cities, or counties along the line of the Chicago, Danville and Vincennes Railroad to contribute toward the construction of said railroad." The first section of that act authorizes the several *counties* through which the road shall pass, by action of the board of supervisors, or by action of the county court in counties not acting under township organization, to make appropriations or loan their credit in such sums and upon such terms and conditions as they deem proper, to aid in the construction of such road; provided, the appropriation is first voted by the electors. The second section provides that "the legal voters of any town, township or city along the line of said railroad, whether said railroad shall run into or through said town, township, or city, or not, may, by a majority of the legal voters voting at any election held for the purpose, make appropriations or donations to aid in the construction of said railroad, and the proper authorities *shall levy and collect taxes*, in the manner that other taxes are levied and collected, to promptly meet any obligations assumed under and by virtue of this act."

The fourth section provides that "the authorities of any township, town, or city — such township, town, or city having voted to contribute aid in the construction of said railroad — may borrow money to promptly meet such contribution, and issue bonds of such township, town, or city, . . . and shall have power to levy and collect such taxes as may be necessary to pay accruing interest or pay the principal sum." This last section, it is contended, gave the supervisor and town clerk of Concord authority to issue negotiable bonds in payment of the appropriation or contribution voted by the township of Concord. In this view we do not concur.

The constitution of Illinois adopted in 1870 provides that "no county, city, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: *Provided, however*, That the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions [or donations,

Chicago & Iowa Railroad v. *Pinkney*, 74 Ill. 277; *Fairfield* v. *County of Gallatin*, 100 U. S. 47, 50], where the same have been authorized under existing laws, by a vote of the people of such municipalities prior to such adoption." The corporate authorities of Concord — the electors of the township — voted, November 20, 1869, in favor of levying a tax for the purpose of raising the sum of $25,000 in two years, "to be donated to the Vincennes, Danville and Chicago Railroad Company [meaning the Chicago, Danville and Vincennes Railroad Company], provided said company run said railroad through the villages of Concord and Sheldon." The road was never constructed into or through either of said villages. It did not touch either township; nor did the electors of Concord township ever vote upon the subject of issuing bonds in payment of the donation so voted. If, under these circumstances, the authorities of that township ever had power, under the act of March 24, 1869, to issue bonds to meet that donation, that power was withdrawn by the constitution of 1870, before the bonds in suit were issued. The section of that instrument relating to municipal subscriptions to railroad corporations went into operation July 2, 1870. *Louisville* v. *Savings Bank*, 104 U. S. 469; *Schall* v. *Bowman*, 62 Ill. 321. Since that day no municipal corporation of Illinois has possessed authority to subscribe to the stock of a railroad or private corporation, or to make donations to or loan its credit to them, except that a subscription or donation, lawfully voted by the people before the adoption of that section, could be completed upon the terms and conditions approved by the electors. There is no saving of the right of such corporation to loan their credit to railroad corporations, where such loan of credit was not embraced in a vote previously taken, under existing laws, and which was favorable to a subscription of stock or a donation. The township of Concord voted a donation merely, to be met by taxation within the period of two years, and to be paid if the railroad was constructed through the villages of Concord and Sheldon, and not a donation to be met by interest-bearing bonds covering a period of ten years. Some question is made as to whether the township did not, by the vote at the special

election of June 30, 1870, lawfully rescind the vote of November 20, 1869. Upon that question we express no opinion; and it may be assumed, for the purposes of this case, that the election of June 30, 1870, did not affect the legal right of the railroad company to claim the donation voted November 20, 1869, upon the terms and conditions annexed thereto by the electors. But that is the utmost the company could have claimed. It certainly could not, prior to the adoption of the constitution of 1870, have demanded, as of right, that bonds be issued; for the people did not vote for issuing bonds, and the act of March 24, 1869, did not make it imperative upon the township authorities to issue bonds to meet a donation. It only declared that they "*may* borrow money . . . and issue bonds," and in that way pay the contribution which had been voted. The constitution took away all power to impose upon the township any greater burdens than the people had by vote lawfully assumed under existing statutes. These bonds were issued in 1871. Purchasers were bound to know that neither the act of 1867, under which they were issued, nor the act of February 26, 1869, conferred authority to issue them. If they purchased them in the belief that the recital in the bonds of the act of 1867 was a mere mistake, and that the act of March 24, 1869, gave the requisite authority, they were informed by the latter act that the township authorities were not obliged to issue them, and, by the constitution of 1870, that the power to do so was taken away. They were bound to know that the power of the township, after July 2, 1870, was restricted by the constitution to a completion of such subscription or donation as had been lawfully voted before that date; if not upon the precise terms and conditions attached thereto by the vote of the people, upon such terms as did not increase the burden. The bonds contain no recital that they are issued pursuant to a vote of the people had before the adoption of the constitution of 1870, and there is, consequently, no pretence to say that the township is estopped to deny the authority of its supervisor and clerk to execute them. *Crow* v. *Oxford*, 119 U. S. 215.

If it be suggested that the railroad company acquired a

right, by the vote of November 20, 1869, which the constitution of 1870 could not affect, the answer is that the company, in its acceptance, June 20, 1870, of the offer of township aid, stated that it would construct the road pursuant "to the terms and conditions voted by said town," which did not include the issuing of negotiable bonds. Besides, the constitution saved whatever rights were acquired by the company under that vote; for, it left untouched the authority of the township to complete the donation to the company according to the terms upon which it was voted. It only withdrew from the township the power to make new subscriptions or donations, or to loan its credit to a railroad or private corporation, a power which the township had not agreed, prior to July 2, 1870, by vote or otherwise, to exert in behalf of the railroad company. In the interpretation we have placed upon the foregoing section of the state constitution, we are sustained by the judgment of the Supreme Court of Illinois in *Middleport* v. *Ætna Life Ins. Co.*, 82 Ill. 562, 568. See also *Aspinwall* v. *County of Daviess*, 22 How. 364; *Wadsworth* v. *Supervisors*, 102 U. S. 534.

Upon the whole case, and without suggesting other grounds upon which the conclusion we have reached may rest, we are of opinion that the bonds in suit are not valid obligations of the town, notwithstanding the plaintiff purchased them before maturity, without notice of any defence thereto.

The judgment is reversed, with directions to enter a judgment, on the special finding of facts, for the defendant; and it is so ordered.

KATZENBERGER *v.* ABERDEEN.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Submitted March 21, 1887. — Decided April 4, 1887.

The act of the legislature of Mississippi of November, 1858, amending the charter of the city of Aberdeen in that state, conferred no power upon the municipality to issue its negotiable bonds in payment of subscription to railroad stock, and to levy a tax for their payment, until the legal voters of the city should approve of the tax by a vote of a majority of such voters at an election held as other elections in the city.

The curative act of the legislature of Mississippi of March 16, 1872, did not legalize bonds issued illegally before the adoption of the new constitution of 1869, which would not be valid if issued after its adoption.

When, by reason of a change in the constitution of a state, its legislature has no constitutional authority to authorize a municipal corporation to issue negotiable bonds, it cannot validate an issue of bonds by such a corporation made before the change in the constitution, and when the legislature had such power.

THIS was an action at law to recover interest on municipal bonds. Judgment for defendant. Plaintiffs sued out this writ of error. The case is stated in the opinion of the court.

Mr. Calvin Perkins for plaintiffs in error.

Mr. Baxter McFarland and *Mr. E. O. Sykes* for defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a suit brought against the city of Aberdeen, on the 14th of September, 1882, to recover the interest from May 1, 1874, to May 1, 1882, on 156 bonds of the city issued to the Memphis, Holly Springs, Okolona and Selma Railroad Company, under date of April 26, 1870. The alleged authority for the issue of the bonds is an amendment to the charter of the city in November, 1858, Laws of Mississippi, 1858, p. 221, as follows:

Opinion of the Court.

"SEC. 1. *Be it enacted by the Legislature of the State of Mississippi*, That the mayor and selectmen of the city of Aberdeen be, and they are hereby, empowered to contract with the New Orleans, Jackson and Great Northern Railroad Company, or with any other railroad company, and to subscribe in the name, and for the use of the city of Aberdeen, as many shares of the capital stock of said company, and upon such terms and conditions as they may stipulate and agree upon, as they shall deem expedient, not exceeding in amount the sum of one hundred thousand dollars.

"SEC. 2. *Be it further enacted*, That the mayor and selectmen of said city of Aberdeen are hereby empowered to levy and collect a tax on all the property within the corporate limits of said city, subject at the time to state or county tax, and upon the annual gross incomes of all persons or corporations residing or doing business in the corporate limits of said city, to be applied to the payment of the aforesaid subscription of stock as provided in the first section of this act: Provided, That before such tax shall be levied the same shall be approved by a majority of the legal voters of said city, to be ascertained by an election held as other elections in said city.

"SEC. 3. *Be it further enacted*, That the said tax shall be levied and collected as other taxes of said city, and the tax collector is hereby required to execute a bond, with good security, to be approved by the said mayor and selectmen conditioned for faithful performance of his duties as such collector, and that he will pay over the moneys collected, as directed by the said mayor and selectmen, and such tax collector shall receive for his services one per centum on the amount collected, and no more.

"SEC. 4. *Be it further enacted*, That the gross amount of the annual income of each and every person and corporation residing or doing business within the corporate limits of said city, shall be ascertained by the said tax collector, who, for such purposes, is authorized and required to administer an oath to each person, or his agent, or the proper officer of a corporation, as [to] the amount of his, her or their annual income;

and any person wilfully swearing falsely, as to the amount of such income, shall be deemed guilty of perjury, and upon conviction thereof shall be punished as in other cases of perjury.

"SEC. 5. *Be it further enacted*, That this act shall take effect from and after its passage."

On the 26th of April, 1870, the mayor and selectmen of the city passed the following ordinance:

"SEC. 1. *Be it ordained by the mayor and selectmen of the city of Aberdeen, in council assembled*, That the city of Aberdeen do hereby subscribe to the capital stock of the Memphis, Holly Springs, Okolona and Selma R. R. Company the sum of one hundred thousand dollars, to be paid in bonds of the said city of Aberdeen, each of the denomination of five hundred dollars ($500), maturing twenty years from the first day of May, A.D. 1870, bearing eight per cent. interest per annum, payable semiannually on the first days of May and November of each year, said bonds to be signed by the mayor of the city of Aberdeen and countersigned by the treasurer thereof, with the corporate seal of said city affixed.

"SEC. 2. *Be it further ordained*, That the bonds issued in pursuance of section first of this ordinance have interest coupons attached, signed by the treasurer of said city of Aberdeen or with his signature lithographed thereto.

"SEC. 3. *Be it further ordained*, That the form of the bonds of the city of Okolona issued to said railroad company be adopted as the form of the bonds issued to said railroad company by the city of Aberdeen, issued in pursuance of the foregoing ordinances, and that the city attorney be instructed to prepare immediately a form for said bonds and have the same lithographed.

"SEC. 4. *Be it further ordained*, That this subscription is upon condition that said Memphis, Holly Springs, Okolona and Selma Railroad shall pass through the city of Aberdeen, Mississippi, and the amount of said subscription be expended in constructing said railroad in and through the county of Monroe, in said state.

"SEC. 5. *Be it further ordained*, That as soon as said bonds are lithographed and signed, as herein directed, the mayor of

said city shall hand the same over to the Memphis, Holly Springs, Okolona and Selma Railroad Company, and receive therefor the certificate of stock of said company."

Pursuant to this ordinance the stock was subscribed and bonds issued. The bonds were in the usual form of negotiable coupon bonds, and contained the following recital:

"This bond is issued under and pursuant to the constitution and laws of the State of Mississippi, the charter of the city of Aberdeen, and ordinances passed by the mayor and selectmen of the city of Aberdeen on the 26th of April, A.D. 1870."

The declaration states, in substance, the agreement for a subscription, as set forth in the ordinance, to be paid in bonds; the issue of bonds in accordance with this agreement; the purchase by the plaintiffs in March, 1874, of those the interest upon which is sued for, except that the "seven coupons first maturing had at the time of such purchase been detached and paid and were not purchased;" and that none of the coupons for interest had been paid since. There is no averment that the levy of a tax to pay the subscription had ever been approved by the legal voters of the city.

A demurrer to the declaration was sustained by the court below, and a judgment rendered thereon in favor of the city. To reverse that judgment this writ of error was brought.

In our opinion, upon the facts stated in the declaration, the city had no authority to issue the bonds. The amendment of the charter, taken as a whole, shows clearly that the legislature did not intend to allow the city authorities to make a subscription which would bind the tax-payers for its payment by the levy of a tax, until the legal voters had approved of such a tax by a majority vote at an election held as other elections were held. As was said in *Wells* v. *Supervisors*, 102 U. S. 630, the policy of Mississippi, "from its earliest history seems to have been to require municipal organizations to meet their current liabilities by current taxation; and in *Hawkins* v. *Carroll County*, 50 Miss. 735, 762, it was expressly declared that 'the grant of power to such a body of an extraordinary character, such as is not embraced in the general scope of its duties, must be strictly construed.'" In the present case, the mayor

and selectmen had power to contract with the railroad company and to subscribe to its stock on "such terms and conditions as they may stipulate and agree upon;" but there was no express authority to borrow money to meet the payment nor to issue bonds. The authority to agree on "terms and conditions" does not necessarily imply such a power. It more naturally refers to stipulations about the location of the road and the expenditure of the money subscribed of the general character of those which were actually made part of this subscription, namely, that the road should pass through Aberdeen, and that the amount of the subscription should be expended in building it in Monroe County. It could give no power to bind the city to levy a tax to pay the subscription before the tax was voted, because § 2 expressly declares that there shall be no tax without a vote. If voted, the city authorities might probably bind the city for its levy and collection. But if not voted, there was no power to bind the tax-payers in any form for its levy, and that would be the legal effect of a valid negotiable coupon bond given in payment of the subscription, if found in the hands of a *bona fide* holder for value before maturity. If payment could be made without a tax, the mayor and selectmen might subscribe to any extent they deemed expedient. But if the subscription was in any event to be paid by a tax, the tax must be voted before any obligation for its payment could be incurred.

But it is insisted that the city is estopped by the recital in the bonds from denying that they were lawfully issued. The recital is in effect, that they were issued "under and pursuant" to law, the charter of the city, and the ordinance of April 26, 1870. As has been seen, neither the charter nor any other law of the state conferred in express terms power on the city to issue these bonds under any condition of facts. The ordinance of the mayor and selectmen directing their issue is not of itself enough. Legislative authority, express or implied, to pass the ordinance must be shown. The recital, therefore, in its present form, is of matter of law only, because it implies the existence of no special facts affecting the case, except the issue of the bonds under the ordinance to pay

the subscription to the stock without any vote of the electors to be taxed therefor. It is in effect nothing more than a recital that bonds issued under such circumstances were "under and pursuant" to law and the charter of the city. Such a recital does not estop the city from asserting the contrary. To hold otherwise would be to invest a municipal corporation with full legislative power and make it superior to the laws by which it was created. *Dixon County* v. *Field*, 111 U. S. 92.

It is next contended that the bonds were legalized by § 4 of a curative act of the legislature of Mississippi, adopted in 1872, Laws of Mississippi, pp. 313, 314, which is as follows:

"*Be it further enacted*, That all subscriptions to the capital stock of the Selma, Marion and Memphis Railroad Company, made by [any] county, city, or town in this state, which were not made in violation of the constitution of this state, are hereby legalized, ratified and confirmed."

Prior to the passage of this act the name of the Memphis, Holly Springs, Okolona and Selma Railroad Company had been changed by statute to the Selma, Marion and Memphis Railroad Company.

Before the subscription was actually made by the city a new constitution of Mississippi went into effect, known as the Constitution of 1869, Art. XII, § 14 of which is as follows:

"The legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto."

In *Sykes* v. *Mayor of Columbus*, 55 Mississippi, 115, it was decided at October Term, 1877, in reference to this same curative act, that it did not and could not legalize bonds issued before the adoption of the new constitution that would not be valid if issued after. In the opinion, which was delivered by Chief Justice Simrall, it was said, p. 143: "The act of 1872 is not relied on to waive mere irregularities in the execution of the power — but as conferring *power* by *retrospective* operation. If the bonds are obligatory on the city of Colum-

bus, they become so for the first time by virtue of this statute. The legislature of 1872 could not by relation put itself back to 1869, and exercise power not denied or restricted by the constitution of 1832. The measure of its power was the constitution of December, 1869, and it could not ratify an act previously done, if at the date it professed to do so it could not confer power in the first instance. It could authorize a municipal loan conditionally. In order to ratify and legalize a loan previously made, it was bound by the constitutional limitation of its power." The doctrine of this case was fully assented to by this court in *Grenada County Supervisors* v. *Brogden*, 112 U. S. 271.

The bonds in the present case, when issued, were unauthorized and void, so that the only question is whether the curative statute has made them good. The objection to them is not that they were issued irregularly, but that there was no power to issue them at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one. Clearly, therefore, if the legislature had no constitutional authority to grant the new power, a statute passed for that purpose could not have the effect of validating the old bonds. In *Grenada County Supervisors* v. *Brogden* the validating act was sustained, because the subscription was voted by the required two-thirds majority of voters, and, therefore, the constitution of 1869 did not stand in the way of what was done. Here, however, there has been no vote at all.

It is said that in *Sykes* v. *Mayor, &c., of Columbus*, there was no authority to subscribe at all, and, therefore, that case was different from this. But here there was no power to subscribe for payment in bonds; and in principle the two cases are alike. The question is as to the obligation of the taxpayers to pay the subscription by taxation. Under its original authority the city could not and did not create such an obligation. The constitution of the state now prevents the creation of any new liability of that character, unless two-thirds of the qualified voters of the city have agreed to it. That was not done when the bonds were made, and no provision

Counsel for Appellant.

has been made for getting such an agreement now. The curative act is consequently inoperative so far as this subscription is concerned.

Many other questions were discussed in the argument for the plaintiffs in error, but, as they all grow out of the mistaken idea that the original subscription payable in bonds could have been made under the charter as amended in 1858, they need not be specially referred to. Bonds issued without legislative authority cannot be made binding by mere municipal ratification, because there is no more power to ratify than there was to create originally.

The judgment is affirmed.

LAIDLY *v.* HUNTINGTON.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued March 22, 1887. — Decided April 4, 1887.

In a suit by a widow in a court of the state of which she is a citizen, seeking to have dower assigned to her in land within the state conveyed by her husband to A, a citizen of another state, and by the latter conveyed to a corporation created under the laws of the state in which the land lies, to which suit A is made party defendant, there is no separable controversy (if there be any controversy at all) as to A, which warrants its removal to a Circuit Court of the United States.

A petition for removal filed after the case has been heard on demurrer on the ground that the bill does not state facts sufficient to entitle the complainant to the relief prayed for, and after a decree sustaining the demurrer, is too late.

This was an appeal from a decree overruling a motion to remand the cause to the state court from whence it had been removed, and from the final decree in the cause. This court disposed of the case only on the first issue. The case is stated in the opinion.

Mr. J. F. Brown for appellant.

No appearance for appellees.

Mr. Chief Justice Waite delivered the opinion of the court.

This is a suit begun by Vesta Laidly, a citizen of West Virginia, the widow of Albert Laidly, deceased, on the 20th of December, 1881, in the Circuit Court of Cabell County, West Virginia, against C. P. Huntington and Elizabeth Huntington his wife, citizens of New York, and the Central Land Company, a West Virginia corporation, for an assignment of dower in certain land in that county conveyed by and for Albert Laidly to C. P. Huntington, and afterwards by Huntington, during the life of Laidly, to the Land Company, in whose possession it was, under that conveyance, when the suit was begun. The prayer of the bill is, 1, for an assignment in money, to be estimated according to the valuation of the land at the time of the alienation, or if that cannot be done, then, 2, in land. Attached to the bill as exhibits are copies of the deeds under which the conveyances were made to Huntington, two of which purport to have been executed by Laidly and his wife, and a third by another person who held title for Laidly. In addition to these exhibits there is a copy of the deed by Huntington and wife which purports to convey all the land to the Land Company.

To this bill a joint demurrer was filed by Huntington and wife, May 22, 1882, and a separate demurrer by the Land Company. The ground of each demurrer is, that the bill is not sufficient in law. On the 26th of the same month of May, these demurrers were argued and overruled by the court, "but without deciding upon the sufficiency of the acknowledgments to the several exhibits filed with the bill." Thereupon Mrs. Laidly moved the court to dismiss the suit as to Huntington and wife, to which they objected. This motion was argued on both sides and submitted, but, before a decision was reached, Huntington and wife presented their petition for the removal of the suit to the District Court of the United States for the District of West Virginia, sitting in Charleston, having Circuit Court powers, on the ground "that there is a controversy in

said suit which is wholly between citizens of different states, namely, between your petitioners, who are defendants in said suit, and the plaintiff." After the presentation of this petition, the suit was docketed in the District Court upon an order to that effect made by that court November 1, 1882. On the 8th of November, Mrs. Laidly moved that it be remanded, and this motion was denied November 11. Thereupon the defendants moved for leave to reargue the demurrer, and this motion was granted, On the 10th of May, 1883, the court refused Mrs. Laidly leave to dismiss the suit as to the Huntingtons, overruled the demurrers, and dismissed the bill. From that decree this appeal was taken. The grounds now relied on for reversal are, 1, the refusal to remand, and, 2, the overruling of the demurrers and the dismissal of the bill.

The District Court was clearly in error in refusing to remand. There is no separable controversy in the suit, and Mrs. Laidly, the plaintiff, was, when the suit was begun, a citizen of West Virginia, and the Land Company, one of the defendants, a West Virginia corporation, and in law a citizen of the same state. As the legal title to the land was in the Land Company at the time of the death of Albert Laidly, and at the time of the commencement of the suit, the company was an indispensable party. It is difficult to see how Huntington and wife were even proper parties, for according to the bill they had parted with their interest in the land during the life of the husband of Mrs. Laidly, and there is nothing whatever to indicate that when the suit was brought they had any claim whatever to the property. The whole controversy in the case, as we infer from the argument here, is as to the sufficiency of the acknowledgments by Mrs. Laidly of the deeds to Huntington, which she signed and sealed with her husband, to bar her dower. *Thayer* v. *Life Association*, 112 U. S. 717.

The petition was also filed too late, for it was after the case had been heard on a demurrer to the bill because it did not state facts sufficient to entitle the complainant to the relief prayed for, and the demurrer sustained. *Alley* v. *Nott*, 111 U. S. 472.

The decree is reversed on the single ground that the suit should have been remanded to the state court, and, without passing on any of the other questions involved, the cause is remitted to the District Court, with instructions to send it back to the state court as a suit which had been improperly removed, and of which the District Court had no jurisdiction.

Reversed.

BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY *v.* DUNN.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Submitted April 1, 1887. — Decided April 4, 1887.

A case brought here in error from the Supreme Court of a state, in which the trial court refused to let go its jurisdiction on a petition for removal, and in which the Supreme Court of the state affirmed that ruling, is within the spirit of Rule 32, 108 U. S. 591–2, relating to the advancement of causes, and the court, on motion in such a cause, advances it to be heard under the rules prescribed by Rule 6, 108 U. S. 574–5, in regard to motions to dismiss.

This was a motion to advance.

Mr. William A. McKenney for the motion.

No appearance in opposition.

Mr. Chief Justice Waite delivered the opinion of the court.

This case is within the spirit, although not within the letter of Rule 32. The state court refused to let go its jurisdiction on a petition for removal, and the Supreme Court of the State has affirmed the ruling of the trial court to that effect. The only question for our consideration on the writ of error is whether this decision was right. The case is advanced to be brought on for hearing in the way provided by Rule 32, that is to say, under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error or appeals.

Motion granted.

ESTES *v.* GUNTER.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

Submitted March 28, 1887. — Decided April 4, 1887.

G being embarrassed, assigned his property, amounting in value to more than $5000, to S for the benefit of his creditors, with preferences in favor of E to the amount of $10,000. B, an unpreferred creditor, sued out a writ of attachment for $3000, which was followed by similar writs on behalf of other creditors. E filed a bill in equity against G and S and B, and other attaching creditors, to enjoin a sale under the attachments and to have the assignment declared valid; but during the progress of the suit dismissed the suit as to the other attaching creditors. The bill was dismissed on the ground that the assignment was made to hinder and delay creditors. E appealed to this court. On a motion to dismiss on the ground that the claim of B was not sufficient to give this court jurisdiction: *Held*, that the court had jurisdiction, the suit being brought not simply to defeat B's attachment, but to establish the assignment and make it available for E's benefit.

MOTION to dismiss. The case is stated in the opinion of the court.

Mr. Edward Mayes and *Mr. H. M. Sullivan* for the motion.

Mr. Luke E. Wright opposing.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a motion to dismiss, on the ground that the value in dispute does not exceed five thousand dollars. The record shows this: On the 25th of March, 1882, S. H. Gunter, a merchant doing business at Sardis, Mississippi, being unable to pay his debts in full, made an assignment of his stock of goods on hand, and the debts due him by note and book account, to S. G. Spain, for the benefit of his creditors, but with a preference in favor of Estes & Doan to the amount of $10,000 on a debt due them of $12,000 or over. Other creditors to a much smaller amount in the aggregate were also preferred. The

stock of goods was valued at over $12,000, and the notes and accounts were nominally more than $25,000.

A day or two after the assignment Bickham & Moore and three other firms sued out writs of attachment on their respective claims against Gunter, and seized the assigned property. The attachment in favor of Bickham & Moore was first issued for a debt of $3000, and levied on a part only of the stock. The other creditors levied on that taken under this prior attachment, and also on the rest. The ground of the attachments was, that the assignment had been made to hinder and delay creditors, and was therefore void.

While the property taken under these attachments was in the hands of the sheriff, Estes & Doan, on the 17th of April, brought this suit against Spain, the assignee, the several attaching creditors, and the other preferred creditors, to enjoin a sale of the property under the attachments, to have a receiver appointed to take charge of the property and convert it into money pending the suit, to have the assignment declared valid with its preferences, and for a payment to Estes & Doan of the $10,000 to which they were entitled according to its terms. To this bill none of the defendants appeared, except the attaching creditors, and they filed a joint answer, in which they set up the fraudulent character of the assignment. Spain, the assignee, was served with process, but he did not appear, and as to him the bill was taken for confessed.

Upon the filing of the bill the injunction prayed for was granted, and a receiver appointed to take charge of the property and convert it into money, the proceeds to abide the event of the suit. From an affidavit of that receiver, filed in support of our jurisdiction, it appears that he has already realized more than $5300, which has been paid into the registry of the court, or for which he is accountable.

In the progress of the cause Estes & Doan voluntarily dismissed the bill as to all the attaching creditors except Bickham & Moore, and from that time on they and Spain, the assignee, were the only defendants in court. On the 3d of March, 1884, the court, after a hearing of the cause, "being satisfied that complainants are not entitled to the relief sought," dissolved

the injunction and dismissed the bill. From the opinion of the court, which has been sent up with the transcript, it appears that this was done because the evidence showed that the assignment was made to hinder and delay creditors, and was, therefore, void. This was, of course, equivalent to a decision that Estes & Doan could not be paid their preferred debt out of the fund in court in accordance with the terms of the assignment. From that decree this appeal was taken.

The suit was brought, not only to defeat the attachment of Bickham & Moore, but to establish the assignment and make it available for the payment of the preference in favor of Estes & Doan to the the extent of $10,000, if the assigned property produced that sum. It has produced $5300, and there is nothing to show that more may not be realized from it hereafter. Spain, the trustee, is a party to the suit, and the effect of the decree is not only to prevent him from paying to Estes & Doan the amount claimed by Bickham & Moore under their attachment, but anything besides. The decree is not that Bickham & Moore be paid their debt, but that nothing be paid to the complainants. The distribution of the fund in court is to be made hereafter as law and justice may require. The effect of what has been done is to defeat the claim which Estes & Doan have set up in their bill, and, so far as now appears, it matters not to them what disposition is made of the assigned property. That can be determined hereafter when the rights of other parties shall be presented in proper form. The case is, therefore, in principle, like *Shields* v. *Thomas*, 17 How. 2, 3; *Market Company* v. *Hoffman*, 101 U. S. 112; *The Connemara*, 103 U. S. 754; *The Mamie*, 105 U. S. 773; *Davies* v. *Corbin*, 112 U. S. 36.

The motion to dismiss is overruled.

BARRON *v.* BURNSIDE.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Argued March 18, 21, 1887. — Decided April 11, 1887.

The statute of Iowa, approved April 6, 1886, c. 76, which requires that every foreign corporation named in it shall, as a condition of obtaining a permit for the transaction of business in Iowa, stipulate that it will not remove into the Federal Court certain suits which it would, by the laws of the United States, have a right to remove, is void, because it makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States.

The case of *Home Insurance Co.* v. *Morse*, 20 Wall. 445, approved; and the decision in *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, explained.

This was a writ of error brought by Henry S. Barron to review a judgment of the Supreme Court of the state of Iowa, on a trial on a writ of *habeas corpus*, remanding him to the custody of George W. Burnside, sheriff of Linn County, Iowa, by whom he was held under a warrant for his arrest issued by a justice of the peace of Linn County, October 5, 1886, for "the crime of knowingly transacting a portion of the business of the Chicago and North-Western Railway Company within the state of Iowa, when such railway company had no valid permit to do business in the state of Iowa, as provided by c. 76 of the laws of the 21st General Assembly of the State of Iowa, approved April 6, 1886, and taking effect September 1, 1886."

The statute in question is entitled "An Act Requiring Foreign Corporations to File their Articles of Incorporation with the Secretary of State, and Imposing Certain Conditions upon such Corporations Transacting Business in this State." The provisions of the Act are as follows:

"Section 1. That hereafter any corporation for pecuniary profit other than for carrying on mercantile or manufacturing business organized under the laws of any other state or of any territory of the United States or of any foreign country desiring to transact its business, or to continue the transaction of its business in this state, shall be and hereby is required, on

and after September [first], A.D. 1886 to file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state. Said application to contain a stipulation that said permit shall be subject to each of the provisions of this act. And thereupon the secretary of state shall issue to such corporation a permit in such form as he may prescribe for the general transaction of the business of such corporation. And upon the receipt of such permit such corporation shall be permitted and authorized to conduct and carry on its business in this state. Provided that nothing in this act contained, shall be construed, to prevent any foreign corporations, from buying, selling, and otherwise dealing, in notes, bonds, mortgages, and other securities, or from enforcing the collection of the same, in the federal courts, in the same manner, and to the same extent, as is now authorized by law.

"SEC. 2. No foreign corporation which has not in good faith complied with the provisions of this act, and taken out a permit, shall hereafter be authorized to exercise the power of eminent domain, or exercise any of the rights and privileges conferred upon corporations, until they have so complied herewith and taken out such permit.

"SEC. 3. Any foreign corporation sued or impleaded in any of the courts of this state upon any contract made or executed in this state or to be performed in this state or for any act or omission, public or private, arising, originating, or happening in the state, who shall remove any such cause from such state court into any of the federal courts held or sitting in this state, for the cause that such corporation is a non-resident of this state or a resident of another state than that of the adverse party, or of local prejudice against such corporation, shall thereupon forfeit and render null and void any permit issued or authority granted to such corporation to transact

business in this state; such forfeiture to be determined from the record of removal, and to date from the date of filing of the application on which such removal is affected, and whenever any corporation shall thus forfeit its said permit no new permit shall be issued to it for the space of three months, unless the executive council shall for satisfactory reasons cause it to be issued sooner.

"SEC. 4. Any foreign corporation that shall carry on its business and transact the same on and after September 1, 1886, in the state of Iowa by its officers, agents, or otherwise, without having complied with this statute, and taken out, and having a valid permit shall forfeit and pay to the state for each and every day in which such business is transacted and carried on the sum of one hundred dollars ($100), to be recovered by suit in any court having jurisdiction. And any agent, officer or employe who shall knowingly act or transact such business for such corporation when it has no valid permit as provided herein shall be guilty of a misdemeanor and for each offence shall be fined, not to exceed one hundred dollars ($100) or imprisoned in the county jail not to exceed thirty days and pay all costs of prosecution.

"SEC. 5. All acts and parts of acts inconsistent with the provisions hereof are hereby repealed; provided, that nothing contained in this act shall relieve any company, corporation, association or partnership from the performance of any duty or obligation now enjoined upon them or required of them or either of them by the laws now in force."

The information on which the warrant of arrest was issued was as follows:

"State of Iowa, } ss:
"Linn County, }

"Before C. W. Burton, justice of the peace in and for Rapids township.

"The State of Iowa }
v. }
"Henry Barron. }

"The defendant is accused of the crime of knowingly transacting a portion of the business of the Chicago and North-

Statement of Facts.

Western Railway Company within the state of Iowa, when such railway company has no valid permit to do business in the state of Iowa, as provided in chapter 76 of the laws of the 21st General Assembly of said State of Iowa, and taking effect September 1, 1886.

"For that the said defendant, on the 5th day of October, 1886, at the city of Cedar Rapids, in the county and State aforesaid, well knowing the Chicago and North-Western Railway Company to be a foreign corporation organized under the laws of Illinois, and not a corporation organized under the laws of Iowa, and well knowing that the said Chicago and North-Western Railway Company was such foreign corporation for pecuniary profit other than for carrying on mercantile or manufacturing business, to wit, for the operating of a line of railroad, and well knowing that said railway company has failed, neglected and refused to file its articles of incorporation with the secretary of state of the State of Iowa, and has neglected and refused to request the issuance to such Chicago and North-Western Railway Company of a permit to transact business in said State of Iowa, and well knowing that said railway company has no permit to do business in said State of Iowa, as required by said chapter 76 of the laws of Iowa, passed by the 21st General Assembly aforesaid, did knowingly act as a locomotive engineer for the transaction of the business of said Chicago and North-Western Railway Company within the State of Iowa, by running a locomotive engine, with a passenger train attached thereto, through the township of Rapids, in the county and state aforesaid, contrary to law, and the statute in such case made and provided.

J. H. Preston.

"Subscribed and sworn to by J. H. Preston before me, this 5th day of October, A.D. 1886.

E. C. Preston,
Notary Public in and for Linn County, Iowa."
[Notarial Seal.]

Barron, having been arrested, applied to the Supreme Court of the state for a writ of *habeas corpus*, by a petition setting

forth various facts as showing that his imprisonment was illegal, and praying that his petition might be tried before the Supreme Court. The writ was issued, a return was made to it by the sheriff, and the case was heard upon an agreed statement of facts, the only material ones, in the view taken of the case, being, that the Chicago and North-Western Railway Company was and is an Illinois corporation, operating railroads in Iowa, and claiming to do so under the authority of statutes of that State, and that Barron, "at the time he was arrested, was in the employment of the Chicago and North-Western Railway Company, and engaged as an engineer on a locomotive in running a passenger train, which was made up at Chicago, in the State of Illinois, and was destined to Council Bluffs, in Iowa, and that said train was carrying passengers and the United States mails received at different points in the State of Illinois, and destined to points in the State of Iowa and beyond, and also from points in the State of Iowa to other points in the same state," and that he was arrested while he was engaged in controlling the engine on the train while it was running. It was admitted that the company had not complied with the Iowa statute by taking out the required permit.

On the hearing before the state court it was urged, among other things, that the statute of Iowa is void as an attempt to interfere with the jurisdiction of the federal courts, as established by the Constitution of the United States and acts of Congress. The court upheld the validity of the statute.

Mr. W. C. Goudy and *Mr. J. J. Herrick*, for plaintiff in error.

Mr. A. J. Baker, Attorney General of Iowa (*Mr. J. H. Sweeney* was with him), for defendant in error.

I. There is no contractual relation between the corporation and the state.

(1) The statutes of Iowa do not authorize a domestic corporation to sell or lease its railroad and property and franchises to a foreign corporation. It may consolidate, as provided by § 1275, Code of Iowa. It may make joint running

arrangements with such foreign corporation, as provided by § 1276. A corporation of a foreign state may extend its road into Iowa. Chapter 128, Laws 1880. A corporation of Iowa may extend its road into an adjoining state. Section 1277, Code. These are all the methods provided by law in Iowa, whereby a railroad corporation of that state, may contract for through transportation with corporations of adjoining states. Section 1300 of Code applies only to corporations of Iowa.

(2) If the sale was made to the Chicago and North-Western Railway under § 1275, then that is an Iowa corporation. *Muller* v. *Dows*, 94 U. S. 444; *Railway Co.* v. *Whitton*, 13 Wall. 270; *Clark* v. *Barnard*, 108 U. S. 436; *Graham* v. *Boston, &c., Railroad Co.*, 118 U. S. 161. The plaintiff in error insists that the sale was made under § 1300, and was not a consolidation. We therefore claim that inasmuch as § 1300 does not apply to sales or leases by or to connecting railroads of other states, therefore the sale was without authority of law, and there is no contractual relation between the railroad company and the state of Iowa. The corporation is in the state by intrusion and not by contract.

II. Even if the sale is authorized, we insist there is no impairment of the obligation of contract by the state. (1) No property right of the railroad is affected, except as a penalty for non-compliance with lease. The penalty is simply a means of enforcement of the law, and if the subject matter of the law is within the powers of the state, then the penalty is a proper means of enforcement. *Attorney General* v. *Bay State Mining Co.*, 99 Mass. 148. (2) There is nothing in the law repugnant to the Constitution of the United States in so far as the subject of control of corporations is concerned. The state has the undoubted right to decide upon what terms and conditions foreign corporations may obtain a domicile of business within the state. *Attorney General* v. *Bay State Mining Co., supra; Bank of Augusta* v. *Earle*, 13 Pet. 519; *Runyan* v. *Costar*, 14 Pet. 122; *Paul* v. *Virginia*, 8 Wall. 168; *Doyle* v. *Insurance Co.*, 94 U. S. 535; *Ducat* v. *Chicago*, 10 Wall. 410; *Phila. Fire Association* v. *New York*, 119 U. S. 110. (3) The

right of control is specially reserved in the laws of Iowa; both in the statutes under which the Iowa corporations were formed, and in the laws in force when the railroad company claims to have purchased. This reserved right of control gives the state the right to "alter, repeal or abrogate" any rights granted by the State. It cannot deprive the company of its property but may resume or alter what the state granted. (4) This law does not deprive the railroad of any of its property, except as a means of enforcement, and this is justifiable. *Attorney General* v. *Bay State Mining Co.*, *supra*. There is no property right in a tribunal, or a particular remedy. So long as there is a competent tribunal and adequate remedy left, there is no impairment of contract. This is elemental. (5) The Chicago and North-Western Railway Co. is subjected to all these reserved powers of control. *a*. It is subject to the provisions of the laws of 1856, 1860, 1870 and 1872, for the reason that the grantor corporation was so subjected. *b*. It is subjected to the reserved powers contained in § 1090, because said section was in force as a law when the Chicago and North-Western Railway Co. claims to have purchased, and the settled rule of law is that the corporation purchasing, whether the purchase is at judicial sale or by contract *inter partes*, takes subject to the law then in force. *Trask* v. *Maguire*, 18 Wall. 391; *Chesapeake & Ohio Railway Company* v. *Miller*, 114 U. S. 188, 189; *Memphis Railroad Company* v. *Commissioners*, 112 U. S. 609; *St. Louis & Iron Mountain Railway Company* v. *Berry*, 113 U. S. 474; *Chicago, Burlington & Quincy Railroad Company* v. *Iowa*, 94 U. S. 155; *Holyoke* v. *Lyman*, 15 Wall. 500; *Sherman* v. *Smith*, 1 Black, 587; *Beer Company* v. *Massachusetts*, 97 U. S. 25; *Railroad Company* v. *Fuller*, 17 Wall. 560.

III. The law in question does not amount to a regulation of commerce within the meaning of the Constitution of the United States. (1) It has been repeatedly held by this court, that it is not every law which may remotely or indirectly affect commerce, that can be construed to amount to a regulation thereof. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Peik* v. *Railway Company*, 94 U. S. 164; *Munn* v. *Illi-*

nois, 94 U. S. 113; *The Jane Gray* v. *The John Frazier*, 21 How. 184; *Osborne* v. *Mobile*, 16 Wall. 479; *Sherlock* v. *Alling*, 93 U. S. 99; *Telegraph Co.* v. *Telegraph Co.*, 96 U. S. 1; *Paul* v. *Virginia*, 8 Wall. 168; *Gilman* v. *Philadelphia*, 3 Wall. 713. In these cases, and in more that might be cited, the laws did in one way or another, and to a greater or less degree, in some directly, and in others indirectly, operate upon commerce, either with foreign nations or among the states; but this court held, they did not amount to a *regulation* of such commerce. (2) The counsel in claiming that the law in question is a regulation of commerce confounds two powers that in their nature and essence are distinctively different, viz: the control of commerce, and the control of corporations. The one is a transaction, the other the agency of the transaction. Over the transaction the powers of the Federal Government are supreme and exclusive. It is not so over the agency. *Munn* v. *Illinois*, and authorities quoted. "The two governments have supreme authority within their respective spheres, and within them neither can interfere with the other."—(Mr. Justice Field.) (3) Over state highways the state has exclusive control. Over national highways the Federal Government has exclusive control. Neither can interfere with the other. The common state and county roads, turnpikes, canals and railroads are state highways. It constructs them and gives them being, and has the right to control them. *Baltimore & Ohio Railroad* v. *Maryland*, 21 Wall. 456. (4) The navigable waters of the nation are national highways, and over them the powers of the general government are supreme and exclusive. *Baltimore & Ohio Railroad* v. *Maryland*, *supra*. (5) Railroads constructed in territories under charter from Congress are national highways; "but this right passes from the nation to the newly formed state whenever the latter is admitted into the union." The state has the supreme right to say what corporation or persons shall have supervision of these highways within its borders, if any, and upon what terms. (6) The state cannot so control state highways as to prohibit commerce from other states being carried over them. But it may decide as to the *agencies* by which

such highways shall be operated. The former would be a regulation of commerce; the latter not. While it is admitted that the general government for national purposes may take possession and control of the state highways as post roads, and military roads, and commercial highways, it cannot compel one state to permit its highways to be subject to the control of another state; and it matters not whether such control is sought by the sister state directly, or through the agency of corporations created by such sister state. The rule is well settled that a corporation of one state cannot migrate to, and become domiciled in, a sister state, except by the consent of both states. *Thomas* v. *Railroad Co.*, 101 U. S. 84; *Runyan* v. *Coster*, 14 Pet. 122; *Christian Union* v. *Yount*, 101 U. S. 352; *Philadelphia Fire Association* v. *New York*, 119 U. S. 110; *Bank of Augusta* v. *Earle*, and other cases cited. (7) There is a broad field of difference between prohibiting a person, natural or artificial, from bringing goods or passengers into the state, and in prohibiting such person from acquiring control of the highways, on which such goods and passengers are transported. (8) This law does not in any of its terms prohibit the transportation of freight or passengers interstate: its provisions may all be confined to commerce within the state, and to transactions wholly under state control, and do no violence to the language of the law. It is agreed that the Chicago & North-Western Railway is engaged in both state and interstate commerce, and that the train being moved by Barron, plaintiff in error, was engaged in both state and interstate commerce. Counsel say the law, being a unit, cannot be separated. We say their business is not a unit and may be separated. They need not transact both state and interstate commerce by the same train, or by the same employes. The law is beyond question valid, in so far as it applies to business carried on wholly within Iowa. The company must then cease to do *such* business, or be subjected to the penalties of the law.

IV. It is not in violation of the 14th Amendment to the Constitution of the United States. (1) Corporations are not citizens of the United States. *Balt. & Ohio Railroad* v.

Koontz, 104 U. S. 5. (2) A corporation of one state is not a *person* within the meaning of the XIVth Amendment, except within the state of its creation. *Philadelphia Fire Association* v. *New York*, 119 U. S. 110. (3) Any *class* of corporations may be singled out from another class, and regulations applied to the whole class is not a denial of equal protection of the law to such *person* within the meaning of the XIVth Amendment. *Chicago, &c., Railway* v. *Iowa*, 94 U. S. 155; *Munn* v. *Illinois*, 94 U. S. 113; and it matters not that the corporation was doing business in the state before the law was enacted. — See last case cited, page 113, and *Doyle* v. *Ins. Co.*, *supra*. The objection that the law deprives the Chicago & North-Western Railway Co. of the right to remove causes to courts of the United States, and that such right is guaranteed to it by the Constitution is fully met in the case of *Doyle* v. *Ins. Co.* heretofore cited. There is no difference in principle in this respect between the Iowa law involved in this case and the Wisconsin law involved in the case cited.

Mr. Justice Blatchford, after stating the case as above reported, delivered the opinion of the court.

The statute manifestly applies to the Chicago and North-Western Railway Company as an Illinois corporation. The first section provides, that a foreign corporation, desiring to continue the transaction of its business in Iowa, is required, on and after September 1, 1886, "to file with the secretary of state a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders, authorizing the filing thereof, and also authorizing service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that said permit shall be subject to each of the provisions of this act; and thereupon the secretary of state shall issue to such corporation a permit in such form as he may prescribe, for the general transaction of the business of such

corporation; and, upon the receipt of such permit, such corporation shall be permitted and authorized to conduct and carry on its business in this state."

The initial step required is a resolution authorizing the filing of the copy of the articles of incorporation, and authorizing service of process in the manner specified, and requesting the issue of the permit, the application to be accompanied by a stipulation that the permit shall be subject to each of the provisions of the act. This proceeding is a unit. The filing of the articles of incorporation and the provision in regard to service of process are to be authorized by the same resolution which requests the issue of the permit, and this request or application is to contain the stipulation above mentioned. These various things are not separable. They are all indissolubly bound up with the application for a permit, which is to be subject to every provision of the act. The permit cannot be issued unless such a stipulation is given, and the corporation is not to be permitted to carry on its business in the State unless the permit is issued to it and received by it.

Section 3 of the act provides, that, if the permit is issued, and the foreign corporation, being thereafter sued in a court of Iowa, upon a contract made or executed in Iowa, or to be performed in Iowa, or for any act or omission, public or private, arising, originating or happening in Iowa, shall remove the suit from the state court into any Federal court in Iowa, because the corporation is a non-resident of Iowa, or a resident of a state other than the state of the adverse party, or because of local prejudice against the corporation, that fact shall forfeit the permit and render it void, such forfeiture to be determined from the record of removal, and to date from the filing of the application on which the removal is effected.

Section 4 imposes a penalty of $100 a day on the corporation for carrying on its business in Iowa without having complied with the statute, and having a valid permit, and provides that any agent, officer or employe who shall knowingly act, or transact such business, for the corporation, when it has no valid permit, shall be guilty of a misdemeanor, and for each offence shall be fined not to exceed $100, or be imprisoned

in the county jail not to exceed thirty days, and pay all costs of prosecution.

It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in § 3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal court, either on the ground of diversity of citizenship or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the secretary of state, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the state, might not be an unreasonable or objectionable requirement, if standing alone; but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit, and with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal court.

In view of these considerations, the case falls directly within the decision of this court in *Home Insurance Co.* v. *Morse*, 20 Wall. 445. In that case, which was twice argued here, a statute of Wisconsin provided that it should not be lawful for any foreign fire insurance company to transact any business in Wisconsin unless it should first appoint an attorney in that state, on whom process could be served, by filing a written instrument to that effect, containing an agreement that the company would not remove a suit for trial into the Federal court. The Home Insurance Company, a New York corporation, filed the appointment of an agent containing the following clause: "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal courts." A loss having occurred on a policy issued by the company, it was sued in a court of the state. It filed its petition in proper form for the removal of the suit into the Federal court. The state court refused to allow the removal, and, after a trial, gave a judgment for the plaintiff, which was

affirmed by the Supreme Court of Wisconsin. The company brought the case into this court, which held these propositions: *First*, The agreement made by the company was not one which would bind it, without reference to the statute; *Second*, The agreement acquired no validity from the statute. The general proposition was maintained, that agreements in advance to oust the courts of jurisdiction conferred by law, are illegal and void, and that, while the right to remove a suit might be waived, or its exercise omitted, in each recurring case, a party could not bind himself in advance, by an agreement which might be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case might be presented.

In regard to the second question, the proposition laid down was, that the jurisdiction of the Federal courts, under Art. 3, § 2, of the Constitution, depends upon and is regulated by the laws of the United States; that state legislation cannot confer jurisdiction upon the Federal courts, nor limit or restrict the authority given to them by Congress in pursuance of the Constitution; and that a corporation is a citizen of the state by which it is created, and in which its principal place of business is situated, so far as its right to sue and be sued in the Federal courts is concerned, and within the clause of the Constitution extending the jurisdiction of the Federal courts to controversies between citizens of different states. The conclusions of the court were summed up thus: 1st, The Constitution of the United States secures to citizens of another state than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the removal statute; 2d, The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws made in pursuance thereof, and is illegal and void; 3d, The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed. For these reasons the judgment of the Supreme Court of Wisconsin was reversed, and it was directed that the prayer of the petition for removal should be granted.

The case of *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, is relied on by the defendant in error. In that case, this court said, that it had carefully reviewed its decision in *Insurance Co.* v. *Morse*, and was satisfied with it. In referring to the second conclusion in *Insurance Co.* v. *Morse*, above recited, namely, that the statute of Wisconsin was repugnant to the Constitution of the United States, and was illegal and void, the court said, in *Doyle* v. *Continental Insurance Co.*, that it referred to that portion of the statute which required a stipulation not to transfer causes to the courts of the United States. In that case, which arose under the same statute of Wisconsin, the foreign insurance company had complied with the statute, and had filed an agreement not to remove suits into the Federal courts, and had received a license to do business in the state. Afterwards, it removed into the Federal court a suit brought against it in a state court of Wisconsin. The state authorities threatening to revoke the license, the company filed a bill in the Circuit Court of the United States, praying for an injunction to restrain the revoking of the license. A temporary injunction was granted. The defendant demurred to the bill, the demurrer was overruled, a decree was entered making the injunction perpetual, and the defendant appealed to this court. This court reversed the decree and dismissed the bill. The point of the decision seems to have been, that, as the State had granted the license, its officers would not be restrained by injunction, by a court of the United States, from withdrawing it. All that there is in the case beyond this, and all that is said in the opinion which appears to be in conflict with the adjudication in *Insurance Co.* v. *Morse*, must be regarded as not in judgment.

In both of the cases referred to, the foreign corporation had made the agreement not to remove into the Federal court suits to be brought against it in the state court. In the present case, no such agreement has been made, but the locomotive engineer is arrested for acting as such in the employment of the corporation, because it has refused to stipulate that it will not remove into the Federal court suits brought against it in the state court, as a condition of obtaining a permit, and conse-

quently has not obtained such permit. Its right, equally with any individual citizen, to remove into the Federal court, under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day; and the State of Iowa might as well pass a statute to deprive an individual citizen of another state of his right to remove such suits.

As the Iowa statute makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void.

The question as to the right of a state to impose upon a corporation engaged in interstate commerce the duty of obtaining a permit from the state, as a condition of its right to carry on such commerce, is a question which it is not necessary to decide in this case. In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States. *La Fayette Ins. Co.* v. *French*, 18 How. 404, 407; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Ins. Co.* v. *Morse*, 20 Wall. 445, 456; *St. Clair* v. *Cox*, 106 U. S. 350, 356; *Phila. Fire Assn.* v. *New York*, 119 U. S. 110, 120.

The judgment of the Supreme Court of Iowa is reversed, and the case is remanded to that court, with an instruction to enter a judgment discharging the plaintiff in error from custody.

Syllabus.

McCONIHAY *v.* WRIGHT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Argued March 21, 22, 1887. — Decided April 11, 1887.

The test of equity jurisdiction in the courts of the United States — namely, the adequate remedy at law — is the remedy which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress; and is not the existing remedy in a State or Territory by virtue of local legislation.

A mining and manufacturing corporation in Virginia acquired title by deed to 10,000 acres of land in that part of the state which afterwards became West Virginia, and then, under a law of Virginia, acquired title, by condemnation, to a strip of land for a right of way to it from the Kanawha River over adjoining lands. The company becoming embarrassed, judgment creditors commenced proceedings in equity to secure the marshalling of the assets of the corporation and their application to the payment of its debts. These proceedings resulted in a sale to C, which sale was confirmed and a deed executed. Subsequently C filed a bill to enforce certain trusts accompanying the purchase, and then an amended bill, making the corporation a party. In the latter it was averred that the tract for the roadway had been sold under the decree, and had been left out from the deed by the commissioner by mistake, and the bill prayed that the tract should be decreed to be conveyed to C. The company answered by the same counsel representing C, admitting these facts to be true. The court decreed a sale of all the property, including both tracts, which was made accordingly, and the sale confirmed, and a deed to the purchaser made. *Held*, that the title of the corporation in the tract acquired by condemnation passed to the purchaser under the second sale as fully as if conveyed by the company by a deed under its corporate seal, and that, under the circumstances, the employment of the same counsel by the company and by C, was not evidence of fraud.

The provisions of § 20 of the Act of the State of Virginia of March 11, 1837, relating to railroads, are not applicable to the railroad constructed by the Winifrede Mining and Manufacturing Company; or, if applicable, the charter of the company was in that respect altered by the Virginia Code of 1849; and this conclusion is not affected by the fact that the charter was granted by the legislature after the enactment of the code, but before it went into operation.

If the insolvency of the Winifrede Company, and the sale of its property as an entirety, including land acquired by condemnation for use as an outlet from its mines to a navigable river, constituted an abandonment of the property thus acquired, and a cesser of use, it did not thereby revert to the original owner; but the forfeiture could be enforced, if at all, only by the State.

Statement of Facts.

THE complainant in this case, Theodore Wright, the appellee, a citizen of the State of Pennsylvania, filed his bill in equity September 24, 1881, against the appellants, citizens of the State of West Virginia, the object and prayer of which were to quiet his title to certain real estate described therein. The title of the complainant to the premises in controversy was derived from the Winifrede Mining and Manufacturing Company, a corporation of the State of West Virginia. That company was chartered by a special act of the legislature of Virginia, February 16, 1850, and made a body politic "for the purpose of exploring, digging, mining, raising, and transporting coal and other minerals and substances, and for manufacturing mineral, vegetable, and other articles in and from the counties of Kanawha and Boone, and such other counties as may hereafter be created out of parts of said counties."

The third section of its charter was as follows: "That it shall and may be lawful for the said company to erect and construct a slack-water navigation from some convenient point on Kanawha or Coal rivers, contiguous to their said lands, and along the bed of the said Coal River to the Great Kanawha: *Provided, however*, That nothing in this act contained shall be so construed as to prevent the said rivers from being and remaining public highways, free for the navigation of all the citizens of this commonwealth; and also to construct such railroad or railroads from any point on their said lands to the Great Kanawha River, or any other navigable stream in the valley of the Kanawha River and its branches, or to connect with any other railroad or improvement which is now or may hereafter be authorized by the State of Virginia in the said valley of the Kanawha and its branches; and to enable the said company to carry out the provisions in this section contained, they are hereby invested with all the rights, powers, and privileges, and subjected to all the limitations and restrictions, contained in an act entitled, 'An act prescribing certain general regulations for the incorporation of railroad companies,' passed March 11, 1837, so far as the same are applicable to and not inconsistent with the provisions of this act."

By the second section of the charter the company was

authorized to purchase and hold lands, not exceeding 10,000 acres at any one time, in the said counties of Kanawha and Boone, or in any new counties that had been or might thereafter be formed and created out of parts of said counties.

In pursuance of the authority given by its charter the Winifrede Mining and Manufacturing Company of Virginia, on the 8th of January, 1853, acquired by deed a title in fee simple to a tract of land containing about 10,000 acres. John McConihay owned land between this tract and the Kanawha River. For the purpose of acquiring a right of way for a railroad, and a depot on the banks of the Kanawha River, in order to transport its coal, the Winifrede Company, by judicial proceedings, appropriated a tract through the lands of McConihay, being a narrow strip four or five miles long, connecting its tract of coal land with the bank of the river. That strip, appropriated in that way and for that purpose, was the subject of the controversy in this suit. A demurrer interposed by the defendants was overruled, and the case was heard finally upon bill, answer, replication, and proofs. A decree was rendered in favor of the complainant, from which the defendants prosecuted the present appeal.

Mr. J. F. Brown for appellants.

I. The demurrer should have been sustained. (1) The plaintiff had ample and complete remedy at law. (2) No leave of court was had, though the bill shows that the property is yet in the control of the court. (3) There is a want of proper parties. Cram is not before the court.

II. The bill should have been dismissed at the hearing; because the defendants proved their title. The act of 1837 provided a reversion to the former owner, upon an abandonment of the public use — the Code of 1849 provided that an estate in fee simple should pass by condemnation proceedings. The special act of 1850, by which alone this company acquired the right to condemn land, ignored the Code of 1849 and granted the company only the rights and powers specified in the prior act of 1837, subject to all the limitations and re-

strictions of that act. This amounted to a reënactment of the act of 1837 for the purposes of this company, and was as to it a repeal of all inconsistent acts, including the act of 1849. The fact that the Code of 1849 had not yet gone into effect is immaterial. It was liable to repeal from the date of its passage, and as to the Winifrede Mining and Manufacturing Company, the act of February 16, 1850, did repeal it. The right in the corporation to exercise the right of eminent domain was part of its franchise, and conditioned upon the discharge of the correlative duties to the public. The use of the lands thus taken is no less a part of the franchise held upon a like condition. The legislature could not confer upon private individuals the power to condemn lands; no more should corporations, that have acquired land by the exercise of this right under an alleged intention to construct and operate a railroad for the public use, be permitted to abandon its purpose, and transfer the lands so taken to private individuals for private ends, — by indirection do that which the legislature itself could not authorize.

By the act of 1837, the advantages anticipated from the operation of the road were required to be set off against the just compensation guaranteed by the Constitution; and in the case at bar the set-off was applied. Any different act than that of 1837, providing for a reversion upon failure of the consideration would violate the constitution of the state. *East Alabama Railway* v. *Doe*, 114 U. S. 340; *Louisville & Nashville Railroad* v. *Covington*, 2 Bush, 526; *Strong* v. *Brooklyn*, 68 N. Y. 1.

That corporations are confined strictly to the powers and rights granted by their charters, and can have nothing not expressly given, is established by the following cases, and meets the claim of the plaintiff to a fee simple absolute in the land in controversy: *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 587; *Beach* v. *Fulton Bank*, 3 Wend. 573; *People* v. *Utica Ins. Co.*, 15 Johns. 358;[1] *Le Couteulx* v. *City of Buffalo*, 33 N. Y. 333; *Camden & Amboy Railroad* v. *Remer*, 4 Barb. 127; *Mobile & Ohio Railroad* v. *Franks*, 41 Miss. 494; *Trustees* v.

[1] *S. C.* 8 Am. Dec. 243.

Peaslee, 15 N. H. 317; *Shaumut Bank* v. *Plattsburgh, &c., Railroad*, 31 Vt. 491; *Pennsylvania, &c., Nav. Co.* v. *Dandridge*, 8 G. & J. 248;[1] *Vandall* v. *South San Francisco Dock Co.*, 40 Cal. 83; *Winter* v. *Muscogee Railroad*, 11 Geo. 438; *Whitman Mining Co.* v. *Baker*, 3 Nevada, 386; *Ruggles* v. *Collier*, 43 Missouri, 353; *Rochester Ins. Co.* v. *Martin*, 13 Minn. 59; *Occum Co.* v. *Sprague Mf'g Co.*, 34 Conn. 529; *Maddox* v. *Graham*, 2 Met. (Ky.) 56; *East Anglian Railways* v. *Eastern Counties Railway*, 11 C. B. 775; *People* v. *Albany*, 11 Wend. 539;[2] *Beatty* v. *Knowler*, 4 Pet. 152.

That the power to take private property is strictly construed; so, also, the nature of the interest, whether in fee or an easement: *Downing* v. *Mt. Washington Railroad*, 40 N. H. 230; *Petersburg* v. *Metzker*, 21 Ill. 205; *Fuller* v. *Plainfield Acad. School*, 6 Conn. 532; *Commonwealth* v. *Erie, &c., Railroad*, 27 Penn. St. 339;[3] *White's Bank* v. *Toledo Ins. Co.*, 12 Ohio St. 601; *Pacific Railroad* v. *Seeley*, 45 Missouri, 212.

Mr. R. C. McMurtrie and *Mr. E. B. Knight* for appellee.

Mr. Justice Matthews, after making the foregoing statement of the case, delivered the opinion of the court.

The first error assigned is, that the case is not one of equitable jurisdiction, it being contended that the complainant below had a complete and adequate remedy at law. The bill sufficiently alleges that the complainant is in possession of the premises in controversy, and in this respect is supported by the proofs. The prayer of the bill is, that the defendants may be required to assert and declare the rights and title claimed by them in and to the premises, and that in the meantime they may be enjoined "from interfering with or hindering or obstructing your orator, his agents, or employes, in any manner in the use and enjoyment of said way and depot until the further order of said court," and for general relief. The contention of the appellants, however, is, that by the statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made in support of this

[1] *S. C.* 29 Am. Dec. 543. [2] *S. C.* 27 Am. Dec. 95. [3] *S. C.* 67 Am. Dec. 471.

contention to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in land, although not in possession. Admitting this to be so, it, nevertheless, cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills *quia timet*, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress.

The next assignment of error is that the proof fails to sustain the title set up by the appellee. That title is based upon two judicial sales. The first of these was a sale to Henry A. Cram, in a proceeding commenced in 1860 by the Bank of Virginia and other judgment creditors against the Winifrede Mining and Manufacturing Company, the object of which was to marshal the assets of that corporation and apply them to the payment of its debts. A decree was rendered therein on January 26, 1861, ascertaining the debts of the company and their priority as liens, and ordering a sale of its property for their satisfaction. That decree directed the sale of "that ten thousand-acre tract of land belonging to the Winifrede Mining and Manufacturing Company, fully set out and described in the bill and exhibits and other proceedings in this cause, and lying on Kanawha and Coal rivers and on Field's Creek, in the counties of Kanawha and Boone, together with all improvements thereon used in the mining, transporting, and shipping of coal, including railroad iron, picks, shovels, cars, engines, and whatever other tools and implements there

may be upon the property belonging to said company." The sale to Cram was duly confirmed by the court, and a deed conveying the property made to him by the commissioner. Subsequently, in 1878, Henry A. Cram, the purchaser, filed his bill in equity against Edward A. Bibby and others, in which he alleged that the purchase made by him at the sale under the decree in favor of the Bank of Virginia was made in trust on behalf of himself and others. The object and prayer of his bill were, that the trusts arising out of the agreements set forth therein, in pursuance of which the purchase was made, might be administered and carried out under the direction of the court, and an account taken of the expenditures of the complainant, the property sold, and the proceeds divided among the parties in interest. By an amendment, the Winifrede Mining and Manufacturing Company was made a party to the bill; and in a second amendment it was alleged that at the sale made under the decree in the Bank of Virginia case, the railroad track and road-bed leading from the Kanawha River to the ten thousand-acre tract, some five miles long, more or less, was sold and should have been conveyed by the commissioner in his deed to the complainant, but by mistake was left out and not embraced in the conveyance. The complainant, therefore, prayed that the Winifrede Mining and Manufacturing Company, and all parties named as defendants in the original bill, be made defendants to the amended bill, and that the court would treat the roadway as a part of the property embraced in the deed to the complainant; adding that it was a coal property, that the road and road-bed and rails cost some $300,000, and that the property was valueless without this roadway, and the court was asked to sell the property, including the roadway as an entirety. To this amended bill an answer was filed in the name and on behalf of the Winifrede Mining and Manufacturing Company, admitting the allegations of the bill and amendments to be true, and particularly that the property, including the road-bed and the ten thousand-acre tract and rails, was sold as an entirety, and as such purchased by Cram, and should have been included in the deed from the commissioner to him as purchaser.

In this suit a final decree was passed ordering a sale of the property as prayed for and described. It was declared in that decree that "the legal title to the tract of 10,180 acres of land, more or less, situated on Field's Creek and Big Coal River, West Virginia, and in the bill and amended bills more particularly described, together with the road-bed and right of way from the same to the Kanawha River, including the front property," was vested in the complainant, Henry A. Cram, and the property as thus described was ordered to be sold. At this sale Theodore Wright, the appellee, became the purchaser for the sum of $120,000. This sale was confirmed by the court and a deed ordered to be made, upon payment of the purchase money.

The objection of the appellants, that these proceedings do not vest in Theodore Wright, the appellee, the title which was in the Winifrede Mining and Manufacturing Company to the premises in dispute, cannot be sustained. It could avail the appellants as a defence only by showing that the legal title was still outstanding in the Winifrede Mining and Manufacturing Company, and that as between that company and Wright the latter was wrongfully in possession; but that question has already been adjudged as between the Winifrede Mining and Manufacturing Company and Cram, to whose title Wright succeeds by the decree of the Kanawha Circuit Court, as against which that company can no longer assert any title, either at law or in equity, to the property in controversy. Wright is now vested by virtue of that decree with whatever title the Winifrede Mining and Manufacturing Company had to the premises as completely as if that title had been conveyed to him by the company by a deed under its corporate seal. It is said, however, by the appellants, that the decree rendered in the suit in which Cram was a complainant was collusive and fraudulent, because it appears upon the face of the record that the Winifrede Mining and Manufacturing Company appeared without process and answered, but not under its corporate seal, by the same counsel who represented Cram. This, however, is not proof of fraud, but only of a consent to do what it appears to have been perfectly proper to do; that is, to make good an imperfect conveyance.

Were it otherwise the imputed fraud is not one of which the appellants are the proper party to complain, being strangers to the transaction.

The third assignment of error is, that before the decree in the Cram suit, the title originally acquired by the Winifrede Mining and Manufacturing Company had failed and ceased, and by force of the statute under which it was acquired had reverted to the appellants as heirs at law and assigns of John McConihay. It will be remembered that the charter of the Winifrede Mining and Manufacturing Company, having authorized it to construct a railroad from its lands to the Great Kanawha River, for that purpose invested the company with all the rights, powers, and privileges, and subjected it to all the limitations and restrictions contained in the act entitled "An act prescribing certain general regulations for the incorporation of railroad companies," passed March 11, 1837, "so far as the same are applicable to and not inconsistent with the provisions of this act."

The act of March 11, 1837, thus referred to, contained provisions in reference to the organization of railroad companies generally, defining the powers of directors, conferring power to condemn land for right of way and depot purposes, and providing for the assessment of damages therefor. In prescribing the mode in which the freeholders appointed to ascertain the damages payable to the proprietor of the lands, by reason of the condemnation thereof for the use of the company, should act, it declares that "they shall consider the proprietor of the land as being the owner of the whole fee-simple interest therein; they shall take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof; and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the railroad for the use of which his land is condemned: *Provided*, That not less than the actual value of the land, without reference to the location

and construction of the road, shall be given by the commissioners."

It also provided for rendering judgment in favor of the proprietor for the amount of the damages awarded to him, and said: "And when such judgment shall be satisfied by the payment of the money into court or otherwise, the title of the land for which such damages were assessed shall be vested in the company in the same manner as if the proprietor had sold and conveyed it to them."

The 20th section of the act is as follows: "The works of the company shall be executed with diligence, and if they be not commenced within two years after the passage of the act of incorporation, and finished within the period which may be therein prescribed; and in case the company at any time after the said road is completed shall abandon the same, or cease to use and keep it in proper repair, so that it shall fail to afford the intended accommodation to the public, for three successive years, then and in that case also their charter shall be annulled as to the company, and the State of Virginia may take possession of the said railroad and works, and the title thereto shall be vested in the said state so long as it shall maintain the same in the state and manner required by said charter; otherwise the lands over which the said road shall pass shall revert to and be vested in the person or persons from whom they were taken by concession or inquisition as aforesaid, or their heirs or assigns."

The 35th section of the same act provides, that "any part of any charter or act of incorporation granted agreeably to the provisions of this act shall be subject to be altered, amended, or modified by any future legislature as to them shall seem proper; except so much thereof as prescribes the rate of compensation or tolls for transportation: *Provided*, That the rights of property acquired under this act, or any other act adopting the provisions of this act, shall not be taken away or impaired by any future act of the legislature."

The contention on the part of the appellants is, that by virtue of the 20th section of the act of March 11, 1837, above quoted, the premises in dispute reverted to them as the heirs

and assigns of John McConihay, having been appropriated to the use of the Winifrede Mining and Manufacturing Company under the provisions of that act, and having been abandoned by the company for more than three successive years for the uses for which the appropriation had taken place, and the State of Virginia not having interposed on its own behalf.

It further appears, however, that in August, 1849, a general code of laws, known as the Code of 1849, was passed by the legislature of Virginia, to take effect on July 1, 1850. Section 1, c. 61, of that code, is as follows: "Every company which is governed by the act passed on the 7th day of February, 1817, prescribing certain general regulations for the incorporation of turnpike companies, or by the act passed on the 11th day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and every company which after the commencement of this act shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the 57th chapter and in this chapter, so far as they can apply to such company without violating its charter."

By § 11, tit. 17, of that act, it is provided, in reference to the damages awarded for compensation to the proprietor for lands taken for the use of corporations, that "upon such payment the title to that part of the land for which such compensation is allowed shall be absolutely vested in the company, county, or town in fee simple." And § 28 is as follows: "When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its works, property, and debts among those entitled thereto."

The proceedings between the Winifrede Mining and Manufacturing Company and John McConihay for the appropriation

of the lands in controversy for right of way and depot purposes for its railroad took place in 1853, and whatever title he acquired by virtue of those proceedings vested after the Code of 1849 took effect. It is contended on the part of the appellee, that the nature and character of that title are determined by that act, and not by the act of March 11, 1837; although it is also insisted that if the act of 1837 remained in force for that purpose, nevertheless there has been no failure of title by reason of its conditions.

In our opinion the case is not governed by the 20th section of the act of March 11, 1837. The act to incorporate the Winifrede Mining and Manufacturing Company does not adopt all the provisions of that act in every particular as a part of its charter, but only "so far as the same are applicable to and not inconsistent with the provisions of this act." A manifest difference exists between such a road as that constructed under the charter of the Winifrede Mining and Manufacturing Company for the purpose of transporting coal from the mines to a navigable river or other railroad, and such railroads as were within the purview of the act of March 11, 1837, which were railroads for the general transportation of persons and property between distant points. It is in reference to the latter alone that we think the provisions of § 20 apply; the railroads referred to in that section plainly being such that, in case of abandonment by the company owning the same, the State of Virginia might take possession thereof and maintain them in the state and manner required by the charter of the company. The provisions of that section, in our opinion, are not applicable to the case of such a road as that of the Winifrede Mining and Manufacturing Company.

Were it otherwise, however, we are satisfied that the charter of the Winifrede Mining and Manufacturing Company, in this particular, was altered by the operation of the Code of 1849. Chapter 61 of that act applies to companies incorporated to construct and carry on works of internal improvement, including railroads. The first section declares that "every company which is governed by the act passed on the 7th day of February, 1817, prescribing certain general regulations for the

incorporation of turnpike companies, or by the act passed on the 11th day of March, 1837, prescribing certain general regulations for the incorporation of railroad companies, and every company which, after the commencement of this act, shall be incorporated to construct any work of internal improvement, shall be governed by the provisions contained in the 57th chapter and in this chapter, so far as they can apply to such company without violating its charter." By the express terms of this section every company previously incorporated, but in existence when that act went into operation, and which, by the terms of its charter, was governed by the act of March 11, 1837, thenceforward was to be governed by the provisions contained in the Code. This includes the Winifrede Mining and Manufacturing Company, which, on July 1, 1850, when the Code took effect, was such a corporation. The Code of 1849 contained no such provision as that embraced within the terms of § 20 of the act of March 11, 1837. On the contrary, it provides, in § 31, that, "if the works of any company be not commenced and completed within the time prescribed by its act of incorporation, or if after such works be completed the company shall abandon the same, or for three consecutive years cease to use and keep them in good repair, in each of these cases the State may either proceed by *quo warranto* or take possession of the works and property of such company; and, in case of so taking possession, shall keep the same in good repair, and have all the rights and privileges previously vested in the company. But the State shall pay the company for such works and property the full value of the same at the time it takes possession thereof."

The 28th section of title 17 is as follows: "When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property and debts due to it shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property, and debts among those entitled thereto."

The appellants rely upon the circumstance that the charter of the Winifrede Mining and Manufacturing Company was passed after the enactment of the Code of 1849, but before it went into operation, as taking it out of the provisions of the Code when it did go into effect; but this circumstance seems to us entirely immaterial. When the Code went into effect on July 1, 1850, the Winifrede Mining and Manufacturing Company was an existing corporation, governed in certain particulars by the act of March 11, 1837. The Code when it went into effect operated upon this company, and from that time became a part of its charter. The title which it afterwards acquired in 1853 was, therefore, not affected by the provisions of the act of March 11, 1837, but was held by it in accordance with the provisions of the Code of 1849.

It is argued, however, by the appellants, that by the general principles of the common law, the title of the Winifrede Mining and Manufacturing Company was forfeited by the abandonment of the property, and a cesser of the uses for which only it could have been acquired, so that it reverted to John McConihay and his heirs and assigns. There was, however, no intentional abandonment of the property by the company for the uses for which it was acquired. The company became insolvent, unable to pay its debts, and to carry on its business. Its property was taken in execution by judgment creditors; a bill in equity was filed by them for the purpose of subjecting its assets to the payment of their claims. To that suit John McConihay was a party as a judgment creditor, holding a judgment for the amount of the compensation awarded to him for the premises in controversy. That judgment, among others, was paid out of the proceeds of the sale of the very property which his heirs and assigns now seek to recover. Having thus obtained the benefit of the sale on which the title of the appellee is founded by receiving a portion of its proceeds, it is not open to them to question the effect of that sale as a conveyance of the subsisting title of the Winifrede Mining and Manufacturing Company to the land in controversy. It is sufficient, however, to say that the Code of 1849, which governs the case, expressly devotes the property

Counsel for Appellants.

of the company, including this right of way, to the payment of its debts, and that no forfeiture of the title, on the ground of an abandonment, can be enforced, except by the state, and on payment to the company of the value of the property, of which, in consequence of such abandonment, it takes possession.

We find no error in the decree of the District Court, and it is accordingly

Affirmed.

FRANCKLYN *v.* SPRAGUE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

Argued December 3, 1886. — Decided April 11, 1887.

The decision of this court in *Hoyt* v. *Sprague*, and in *Francklyn* v. *Sprague*, 103 U. S. 613, so far as applicable to this case, is affirmed and adhered to.

On the organization of the A. & W. Sprague Manufacturing Company, and the conveyance to it of the assets of the old partnership, including the interests of minors conveyed under valid authority derived from the Legislature of Rhode Island, the property ceased to be partnership property; the partners ceased to be partners and became shareholders; their lien on the partnership property as partners ceased when their character as stockholders began; and those who claim through a stockholder cannot set up such lien.

A corporation, formed by and consisting of the members of a partnership, for the purpose of conducting the partnership business and taking the partnership property, takes the latter freed from partnership equities, all of which are settled and extinguished by the transfer.

While a person of unsound mind remains a minor, an ordinary guardian is all the custodian of either his person or estate that is necessary; and an act done by such guardian in relation to his estate, is as valid as if done by a committee appointed to take charge of him and his estate, as a person of unsound mind.

This was an appeal from a final decree of the Circuit Court dismissing a bill in equity. The case is stated in the opinion of the court.

Mr. William Allen Butler for appellants. *Mr. James McKeen* was with him on the brief.

Mr. Benjamin F. Thurston for appellees. *Mr. C. Frank Parkhurst* was with him on the brief.

Mr. Justice Bradley delivered the opinion of the court.

All the essential facts on which this case is based are the same as those involved in the cases of *Hoyt* v. *Sprague* and *Francklyn* v. *Sprague*, reported in 103 U. S. 613. The evidence used in those cases was imported into this by agreement of the parties, and only one new feature has been added. This is the mental incapacity of the present complainant, Edwin Hoyt, called Edwin Hoyt, Jr., in the former cases. The bill of complaint contains substantially the same statements as the bills in those cases, with the addition of an averment that the complainant, by certain proceedings had in the Supreme Court of New York in April, 1874, commonly called a commission of lunacy, was declared to be of unsound mind, incapable of taking care of himself or his property; that he had been in that condition during all his life; and that said Charles G. Francklyn and William S. Hoyt were appointed the committee of his person and estate. The principal facts out of which the litigation grew are stated in the report referred to; but it is proper to restate such of them here as may have a special bearing upon the questions growing out of the alleged incapacity of the complainant.

The brothers, Amasa and William Sprague the elder, were engaged as manufacturers in Rhode Island under the firm of A. & W. Sprague for many years prior to December, 1843, when Amasa Sprague died, leaving a widow, Fanny Sprague, two sons, Amasa and William the younger, and two or three daughters. William, the survivor, with the consent of his brother's widow, who became administratrix of his estate, continued the business under the same partnership name, for the joint benefit of himself and his brother's family, until October, 1856, when he died, leaving a widow, Mary Sprague, a son, Byron Sprague, and four grandchildren, being the children of a deceased daughter, Susan S. Hoyt, wife of Edwin Hoyt, of New York. This daughter had died in October,

1853, and her children were Sarah Hoyt, Susan S. Hoyt, born October, 1845, William S. Hoyt, born January 1, 1847, and Edwin Hoyt, the complainant, born July 16, 1849. Shortly prior to the death of William Sprague the elder, he had taken into the firm as partners with him, his son Byron, and his two nephews, Amasa and William Sprague the younger; so that at the death of William Sprague, in October, 1856, these young men were the surviving partners of the firm. By the enterprise of William Sprague, the property of the joint concern had greatly accumulated, being estimated at the time of his death at several millions of dollars. His widow, Mary, took out letters of administration on his estate; and, on the petition of her son-in-law, Edwin Hoyt, she was appointed guardian of the property and estate, in Rhode Island, of each of her grandchildren, who were the children of the said Edwin Hoyt, and all under fourteen years of age. This was done in February, 1857.

The parties then interested in the joint property of A. & W. Sprague were the two families of Amasa and William Sprague the elder in equal parts; that of the former being represented by Fanny Sprague, widow and administratrix, and her two sons Amasa and William (who had purchased the interest of their sisters); and that of the latter being represented by Mary Sprague, widow and administratrix, her son Byron, and her four grandchildren, the Hoyts, whose interests were represented by her as guardian of their property and estate. This made the property divisible into six equal shares: each widow being entitled to one-third of her husband's part, and the two sons of Amasa being each entitled to a third of his interest; Byron Sprague being entitled to one-third of his father's interest, and the Hoyt children being entitled to the remaining third. As the factories were in successful operation, and as a division of the property was deemed undesirable, all the parties concerned capable of exercising judgment, including Edwin Hoyt, the father of the four minors, were agreed upon the expediency of continuing the operation of the works as a joint concern for the benefit of all in proportion to their several interests, and it was so done, the factories and operations

being conducted by Amasa and William Sprague the younger and Byron Sprague. In 1862 Byron Sprague sold out his interest to his cousins Amasa and William for $600,000, which gave to each of the latter a share and a half of the entire six shares.

Soon after this, two charters were obtained from the legislature of Rhode Island, for the purpose of vesting the property of the concern in corporate bodies, one to be called the A. & W. Sprague Manufacturing Company, and the other the Quidnick Company.

In January, 1863, Mary Sprague, as guardian of the estate of her four minor grandchildren, together with their father, Edwin Hoyt, presented a petition to the legislature of Rhode Island, representing that they deemed it advisable and expedient that the interests of the said minors should be vested in such corporation or corporations as should be organized under and in accordance with the charters granted as aforesaid, and praying as follows:

"Wherefore your petitioners pray that whenever any corporation or corporations shall be organized under either or any of the charters aforesaid, and conveyance or conveyances shall become necessary to vest the title of the parties interested in any of said property in any such corporation or corporations, upon the execution by said Mary and Edwin as principals of every such bond or bonds in such penal sum or sums, and with such sureties, as the court of probate of Warwick shall require, conditioned for the investment of the amount of the full value of the interests hereinafter prayed to be conveyed in the capital stock of any such corporation or corporations to which such interests shall be conveyed as hereinafter prayed, in the names and for the use and benefit of said minors; and on the delivery of such bond or bonds to said court of probate, the said Mary in her capacity as guardian may make, execute, seal, acknowledge, stamp, and deliver all and any such conveyance and conveyances to any such corporation or corporations as shall be necessary to vest the title of the said minors in and to said property in any such corporation or corporations; and that any such conveyance or

conveyances so executed, acknowledged, stamped, and delivered shall be deemed and held as valid and effectual in law and equity to vest the title of said minors in any such corporation or corporations as though the same were executed, acknowledged, and delivered by said minors after attaining their majority; and as in duty bound will ever pray.

"MARY SPRAGUE, *Guardian.*
"EDWIN HOYT."

In pursuance of this petition, the legislature, on the 9th of March, 1863, passed a resolution, having the effect of a law, by which it was enacted as follows:

"Voted and Resolved, That the prayer of said petition be, and the same is hereby, granted; and the said Mary Sprague, in her capacity as guardian of the estate of Edwin Hoyt, Jr., Susan S. Hoyt, Sarah Hoyt, and Wm. S. Hoyt, is hereby authorized and fully empowered, whenever any corporation or corporations shall be organized under either or any of the charters heretofore granted by the General Assembly of this state, and conveyance or conveyances shall become necessary to vest the title of the parties interested in any of said property so held, owned, or managed by the firm of A. & W. Sprague in any such corporation or corporations, to make, execute, seal, acknowledge, stamp, and deliver all and any such conveyance and conveyances to any such corporation or corporations as shall be necessary to vest the right, title, and interest of the said minors in and to said property, or any portion thereof, in any such corporation or corporations; and that any such conveyance or conveyances so executed, acknowledged, stamped, and delivered shall be deemed and held as valid and effectual in law and in equity to vest the title of said minors in any such corporation or corporations as though the same were executed, acknowledged, stamped, and delivered by said minors after attaining their majority: *Provided*, That before the delivery of any such conveyance or conveyances the said Mary shall have executed and delivered to the court of probate of Warwick every such bond or bonds with herself in her said capacity and said Edwin Hoyt as principals,

in such penal sum or sums and with such sureties as said probate court shall require conditioned for the investment of the amount of the full value of the interests of said minors which she shall then be about to convey in the capital stock of any such corporation or corporations to which the same shall be conveyed in the names and for the use and benefit of said minors."

This legislative act was adjudged by this court, in the cases of *Hoyt* and *Francklyn* v. *Sprague*, before mentioned, to be valid and effective to authorize Mary Sprague as guardian of the estate of the four minors, to convey their interests in the A. & W. Sprague property to the corporations named.

The terms of the act were duly complied with, and by an agreement executed on the 1st of April, 1865, by and between all the parties interested in the property, in their various capacities, including Edwin Hoyt, as father of the four minor children, and Mary Sprague, as the guardian of their estate, and as administratrix of her husband's estate, referees were appointed to appraise the entire property and to report the amount of each one's interest therein, with a view to adjust the several shares of capital stock in the corporations to be formed to which each would be entitled. This duty was performed by the referees, who brought the accounts down to the 31st day of March, 1865, and reported that on that day the cash value of the whole property and assets, exclusive of the Quidnick Company property, (which was appraised by itself in consequence of outside parties having some interest therein,) was $6,732,906.69, and that the liabilities amounted to $2,871,921.79, leaving the net value of the estate equal to $3,860,984.90. The different interests in this amount they reported to be as follows:

Mary Sprague's individual interest	$624,984 69
Fanny Sprague's interest	625,511 69
William Sprague's interest	978,867 42
Amasa Sprague's interest	978,867 42
Mary Sprague, guardian of children of Susan Hoyt	652,753 68

They then stated the result of the individual accounts of the several parties with the firm, showing what each was indebted thereto, and what was due to each; and, in this connection, the sum of $188,333.33 was credited as due from the firm to Mary Sprague, guardian of the heirs of Susan Hoyt, to equalize the amounts drawn out of the firm by the two Rhode Island families for their family expenses.

The stock of the A. & W. Sprague Manufacturing Company was awarded by the referees to the various parties according to the value of their respective interests in the property independently of the amounts due from or to them respectively, which last amounts remained as debts due to or from the company. When the property was conveyed to the corporation, as hereinafter mentioned, it was stipulated as an express condition, that the corporation was to assume all the liabilities of the firm of A. & W. Sprague. There being found due to Mary Sprague, as administratrix, for a dividend previously made by the firm, the sum of $164,250.26, she elected to take stock for that, instead of the liability of the company; which increased the total amount of the stock to the sum of $4,025,235.16. This being divided into 10,000 shares, made each share equal in value to $402.52, and gave to Mary Sprague, as guardian of her grandchildren, including their portion of the shares allotted to her as administratrix, 1751 shares, or 439 shares each.

The Quidnick property was valued at $776,065, and divided into 5000 shares, of which 489 shares were allotted to Mary Sprague as guardian of her grandchildren, including their portion of the shares allotted to her as administratrix, being 122 shares to each.

The precise interests of the parties having thus been ascertained, in August, 1865, Mary Sprague, as guardian of the Hoyt children, applied to the probate court of Warwick (the proper jurisdiction) for an order to authorize her, in pursuance of the act of assembly, to convey to the respective corporations the interest of her wards in the properties of the firm of A. & W. Sprague, and of the Quidnick Company, in exchange for the shares to which they were entitled by the report of the

referees. On the 5th of August, 1865, an order was made accordingly; and on the 9th of August, 1865, an instrument was executed by all the parties, including Mary Sprague, as guardian of the Hoyt children, by which, after reciting the powers given to her by the act of assembly and the order of the probate court, they conveyed and transferred to the A. & W. Sprague Manufacturing Company all their respective right, title and interest in the entire property of A. & W. Sprague, except the Quidnick property, including all the right, title and interest of said minors, with the following stipulation, to wit: "It being expressly understood that this conveyance is made upon condition that the grantees are to assume the liabilities of said firm of A. & W. Sprague, in accordance with said agreement of reference hereinbefore referred to."

A similar deed of conveyance was made to the Quidnick Company (corporation) for the Quidnick property and assets.

Thereupon, after adjusting the fractional shares, each party was credited, on the stock ledgers of the respective companies with the shares to which they were severally entitled, the Hoyt children being each credited with 439 shares of the A. & W. Sprague Manufacturing Company, and 122 shares of the Quidnick Company.

In June, 1866, Mary Sprague, as guardian of her said grandchildren, presented to the probate court a petition for the appointment of appraisers, to appraise the property of her wards in her hands, in order that she might return an inventory thereof. Appraisers were accordingly appointed, and performed the duty required of them, and presented inventories and appraisements of each ward's estate, which were sworn to by Mary Sprague, and filed, and approved by the court on the 13th of August, 1866. That of Edwin Hoyt, Jr., with which the others substantially corresponded, was as follows, to wit:

124 shares National Bank of Commerce, $51 . .	$6,324 00
1 U. S. 6 per cent. bond	108 50
2 N. Y., Prov. & Boston R. R. bonds, $950 . .	1,900 00
439 shares A. & W. Sprague M'f'g Co. stock, 402^{525},	176,707 82
122 shares Quidnick Co. stock	18,935 98
Cash	387 44
	$204,363 74
Dividend due from A. & W. Sprague, as cash, March 31, 1865, with interest from that date .	47,083 34
	$251,447 08

Mary Sprague, in her answer, states that the bank stock and bonds had been purchased by her, before the organization of the corporations, with moneys drawn by her from time to time, as guardian, from the firm of A. & W. Sprague. The dividend of $47,083.34, "due from A. & W. Sprague, as cash, March 31, 1865," was one-fourth of the sum of $188,333.33 allowed to the Hoyt children, as before stated.

At the same time, Mary Sprague presented her account, as guardian, with each of her wards, based on the appraisement, notice of such presentation having been duly published in pursuance of a previous order; and the accounts were severally allowed on the same 13th of August, 1866.

After these proceedings were had, Mary Hoyt resigned her guardianship, which resignation was accepted by the court; and on the application of Edwin Hoyt, the father, stating that it was the desire of his three younger children, Susan S. Hoyt, William S. Hoyt, and Edwin Hoyt, Jr., that William Sprague should be appointed guardian of their estate in Rhode Island, (Sarah having become of age,) the appointment was made as requested, and William Sprague, as guardian of the estate of the three younger children, on the 1st of September, 1866, gave the requisite bonds, and filed an inventory in each case, the same as had been presented and filed by Mary Sprague, with the addition of a further dividend made by the corporations on the 1st of September, less amounts paid for the benefit of the wards respectively. The account in the case of

Edwin Hoyt, Jr., the complainant in this case, duly verified by appraisers and by the oath of William Sprague, guardian, was as follows, to wit:

124 shares National Bank of Commerce, $51 .		$6,324 00
1 U. S. 6 per cent. bond		108 50
2 N. Y., Prov. & Boston R. R. bonds, 950 . .		1,900 00
439 shares A. & W. Sprague M'f'g Co., 402^{5275} .		$176,707 82
122 shares Quidnick Co., 155^{213}		18,935 98
Dividend due from A. & W. Sprague, as cash, March 31, 1865		47,083 34
Dividends due from A. & W. Sprague M'f'g Co., cash, Sept. 1, 1866 . .	6585 00	
Less payments by above company .	2979 60	
		3,605 40
Dividends due from Quidnick Co. as cash, Sept. 1, 1866		1,220 00
No real estate		
		$255,885 04

At this time Edwin Hoyt, Jr., the now complainant, was seventeen years of age, Susan, nearly twenty-one, and William S., nineteen.

The record shows various accounts rendered to Susan and William after they became of age, and various amounts paid them. Whether any further sums were advanced on Edwin's account beyond the $2979.60 charged in the inventory, does not appear. He lived with his father in New York, who was a member of the firm of Hoyt, Sprague & Co., a firm intimately connected with the Rhode Island companies, and may have had no occasion for advances on account of his interest.

In the fall of 1873 the A. & W. Sprague Manufacturing Company became embarrassed and suspended payment, and on the 1st of November, 1873, the said company, together with Amasa and William Sprague, and the said Fanny and Mary Sprague, made an assignment to Zachariah Chafee, of all the property, real and personal, of said company and of the said parties individually, and of the firm of A. & W.

Sprague, (excepting shares of capital stock in any corporation,) in trust for the benefit of such creditors as should accept, in payment of their debts, the notes of the company payable in three years from January 1, 1874, with interest. Subsequently, on the 6th of April, 1874, a further assignment was made by said A. & W. Sprague, and the A. & W. Sprague Manufacturing Company to said Chafee, of all of said property, in trust, first, for the benefit of such creditors as should come in and take said notes in payment of their debts; and, secondly, the residue for the benefit of all other creditors of said parties.

In December, 1873, Susan S. Hoyt, who came of age in October, 1866, and who afterwards married Charles G. Francklyn, received from her guardian, William Sprague, the stocks and bonds mentioned in his inventory of her estate before referred to (except the shares in the A. & W. Sprague Manufacturing Company, which were probably deemed worthless); and William S. Hoyt received the stocks and bonds mentioned in the like inventory of his estate. It is also to be inferred from the pleadings and evidence that Edwin Hoyt, Jr., the complainant, at the same time, received the stocks and bonds mentioned in the like inventory of his estate. The bill admits that William Sprague, the guardian, delivered to the complainant (Edwin Hoyt, Jr.) "123 shares in the Quidnick Company and certain other shares of stock," to which he informed the said Francklyn and William S. Hoyt the said Edwin was entitled. It also appears that, on the 9th of December, 1873, Edwin Hoyt, Jr., by an instrument executed by him, sold and assigned his Quidnick Company stock (122 shares) to said Charles G. Francklyn for the sum of $34,000; and on the same day executed a power of attorney to his father, Edwin Hoyt, to transfer the same. Both of these instruments were acknowledged by said Edwin Hoyt, Jr., before a commissioner for the State of Rhode Island in the city of New York. A week previously to this, namely, on the 1st of December, 1873, William S. Hoyt went to Providence to get the various stocks transferred by the guardian to the parties for whom they were held, but, not finding him there, wrote him the following letter, to wit:

"PROVIDENCE, Dec. 1, 1873.

"Hon. WILLIAM SPRAGUE:

"DEAR SIR: I come here to get you to transfer to the respective owners the Quidnick and bank stock which you hold as guardian for my sister, brother, and me, but, as you are absent, I leave with Mr. Greene the power appointing me attorney for my brother and sister, and enclose power appointing Mr. Greene attorney to make the necessary transfer, which please execute, and send to him by return mail.

"Yours truly, W. S. HOYT."

From these statements and proofs it is not only fairly to be inferred that the complainant actually received the bonds and stocks held for him by his guardian, William Sprague, but that his father and the said Charles G. Francklyn and William S. Hoyt, his brother-in-law and brother, who now appear as his committee in this suit, dealt with him as a person capable of transacting business as late as December, 1873.

Indeed, in view of the decision of this court in the cases of *Hoyt* v. *Sprague* and *Francklyn* v. *Sprague*, 103 U. S. 613, the appellant, by his said committee, does not claim, before this court, anything but his one-fourth part of the sum of $188,333.33, which was allowed to the Hoyt children by way of compensation for the amounts drawn out of the concern by the Rhode Island families for their family expenses. The contention is, (and that is the matter now presented for consideration,) that this sum was never converted into the stock of the corporation, but remained a lien on the partnership property, and followed it as such in the hands of the corporation with priority over all other claims against it, except the debts of the firm then due and owing. Can this proposition be maintained? There is no doubt that in 1865, before the property of A. & W. Sprague was conveyed to the corporation, Mary Sprague, as administratrix of her husband's estate, had a lien on the partnership property (subject to the debts then due) for the whole amount of her interest therein; and it was then in her power, had she thought fit, to have demanded a settlement and distribution of the partnership property according to the

several equities of the parties concerned, including the just share of herself and her wards, and, in that share, and as a part of it, the said sum of $188,333.33. But she deemed it more for their advantage (as well as her own) that the property should be kept together, and vested in the corporations proposed to be formed; and in this view she was supported by the opinion and advice of Edwin Hoyt, father of the minors. The act of the legislature of March 9, 1863, gave her power to convey all the right, title, and interest of the said minors in and to the property, to the respective corporations. And this she did. By her conveyance, and that of the other interested parties, the entire property and assets of the partnership were conveyed to, and vested in the corporations, those of A. & W. Sprague, in the A. & W. Sprague Manufacturing Company, and those of the Quidnick Company in the Quidnick corporation, subject, however, to the debts and liabilities of every kind and description. The debts and liabilities of the firm of A. & W. Sprague thereupon became the debts and liabilities of the A. & W. Sprague Manufacturing Company. The property ceased to be partnership property and became consolidated in a unity of interest in the corporation. The partners ceased to be partners, and became holders of shares in the capital stock of the company. Their lien as partners ceased when their character of stockholders began. The mutual accounts showed that various sums were due to the several partners from the firm, or from them to the firm. They might have adjusted these individual balances by stock, adding an equivalent in stock to those who had balances of credit, and deducting an equivalent of stock from those whose balances were against them. But they preferred that these balances should stand as debits and credits against or in favor of the corporation when organized, and they were all disposed of in that way, except one item due to Mary Sprague, as administratrix, for a dividend formerly made by the firm, as before stated. This she preferred to take in stock, and the others consented to it; and she afterwards allotted to her wards their proper share of it. The sum of $188,333.33 which had been credited to Mary Sprague as guardian of her grandchildren, to equalize the

sums drawn out by the other parties for family expenses, she preferred to stand as a debt of the corporation, as it had been a debt of the firm. It was so arranged. The corporation, by the terms of the transfer of all the property, succeeded to and assumed all the debts and liabilities of the firm, — this amongst the rest. This liability was treated exactly like all others, whether due to the partners or to strangers. It was treated as a debt.

Now, can it be justly contended that these debts due to the several partners, when they became the assumed debts of the corporation, continued to be liens on the property, as they had been when it was partnership property? We think not. This would have been subversive of the whole plan. The relation of the parties to the property was entirely changed. Their lien as partners, as well as their character of partners was extinguished. A conveyance or release of property by one who has a lien on it necessarily extinguishes the lien. Mary Sprague, as administratrix and guardian, after conveying to the corporation all her interest and the interest of her wards in the property, parted with all right in it, and accepted in lieu of it shares for her aliquot part in the body of it, and the assumption and engagement of the corporation to pay the balance due to her on the accounts. Having conveyed and parted with the property by virtue of an authority conferred by law, her lien upon it was gone; and those who claim through and under her cannot set up any such lien.

It cannot be said that she sacrificed the interests of her wards by retaining the claim as a debt instead of taking stock for it, as she might have done; because a debt always has priority over capital stock, and is a more favored claim in the law.

The argument that the corporation, being the creature of the partners, was not a *bona fide* purchaser, and must be considered as having taken the property subject to all partnership equities against it, is not a sound one. The constitution of the corporation and the transfer to it of the property, were authorized by law, and were intended to settle and extinguish these equities, and to place the concern on a new footing; and the

very parties entitled to equities were the ones who organized the corporation, and made the conveyance to it. Besides, it is not the corporation alone which is concerned in the transfer, but the creditors who trusted it after it was formed. They, or at least the great mass of them, certainly stand in the position of *bona fide* claimants against its property and assets. They may not be able to claim any precedency over the former partners having debts due to them, but they stand on an equal footing with them.

With these views as to the effect of the conveyance of the interest of the Hoyt children to the A. & W. Sprague Manufacturing Company, the proceedings taken in 1874 by. C. G. Francklyn and Wm. S. Hoyt, to have the complainant in this case declared to be of unsound mind from his birth, cannot have any effect to change the conclusion which we reached in the former cases. Whether he was of unsound mind or not, Mary Sprague was the lawful guardian of his property and estate in Rhode Island from the time of her first appointment in 1857, when he was seven years old, and continued such, with all the rights and powers of a guardian until she resigned that charge in 1866; and the act of the legislature was just as efficacious in relation to his estate as it was in relation to that of the other children. As long as he was a minor an ordinary guardian was all the custodian of either his person or estate that was required. It was only after he became of age, and the power and functions of the guardian ceased, that a committee to take charge of his person and estate was needed.

In Shelford on Lunacy it is said: "It seems, that a commission of lunacy may issue against an infant; but as the court of chancery has power over infant wards of court and their estates, such a proceeding seems unnecessary during the minority of the ward, except under particular circumstances when the more ample powers given in lunacy may be required for managing their estates." In Stock on Non Compos Mentis, it is also said, that, "Infancy is not a ground for withholding [a commission of lunacy], except in so far as it renders such a proceeding unnecessary, by subjecting the infant to another protective power of the Chancellor." Both writers refer to

Halse's case cited in argument in *Ex parte Southcot*, 2 Ves. Sen. 401, 403. In the present case, no word of the complainant's imbecility was ever heard until after the insolvency of the company; and, even if it had appeared, whilst he was a minor, that he was of unsound mind, the legislative act gave full power to the guardian to dispose of his estate, in the manner she did, and removed all objections on that score.

The decree of the Circuit Court is, therefore,

Affirmed.

Mr. Justice Blatchford did not sit in this case, or take any part in its decision.

FARGO *v.* MICHIGAN.

ERROR TO THE SUPREME COURT OF MICHIGAN.

Submitted December 9, 1886. — Decided April 4, 1887.

A state statute which levies a tax upon the gross receipts of railroads for the carriage of freights and passengers into, out of, or through the state, is a tax upon commerce among the states, and therefore void.

While a state may tax the money actually within the State, after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, a tax upon receipts for this class of carriage specifically is a tax upon the commerce out of which it arises, and, if that be interstate commerce, it is void under the Constitution.

The States cannot be permitted, under the guise of a tax upon business transacted within their borders, to impose a burden upon commerce among the States, when the business so taxed is itself interstate commerce.

This was a writ of error to the Supreme Court of the State of Michigan to bring here for review a decree sustaining a demurrer to the complainant's bill in chancery, and dismissing the bill. The complainant brought suit as President of the Merchants' Dispatch Transportation Company, averring that said company was a joint stock association, organized and existing under the laws of the State of New York, and by the

laws of that state authorized to sue in the name of its president. The bill, so far as it presented the questions on which this court can have jurisdiction, charged as follows:

"*Second.* That, during the year ending with the 31st day of December, A.D. 1883, the said transportation company was engaged in the business of soliciting and contracting for the transportation of freight required to be carried over connecting lines of railroad in order to reach its destination, and, for the prosecution of its said business, it had agencies located generally throughout the United States and the Dominion of Canada; the said transportation company issued through bills of lading for such freight, and caused the same to be carried by the appropriate railroad companies, and, as compensation for its service in the premises, the said transportation company was paid by the said railroad companies a definite proportion of the through rate charged and collected by said companies for the carriage of said freights.

"*Third.* That during the said year the said transportation company was possessed of certain freight cars which were used and run by the railroad companies in whose possession they chanced from time to time to be for the transportation upon their own and connecting lines of railroad of through freight, principally between the city of New York, in the state of New York, and Boston, in the state of Massachusetts, and Chicago, in the state of Illinois, and other points and commercial centres in the west, northwest and southwest, without the said state of Michigan; that said cars were not used for the carriage of freight between points situate within the said state of Michigan, but wholly for the transportation of freight, either passing through the state or originating at points without said state and destined to points within, or originating at points within said state and destined to points without; that the said several railroad companies thus making use of said cars during the said year paid to the said transportation company as compensation therefor a definite sum per mile for the distance travelled by the said cars over their respective lines.

"*Fourth.* That the said transportation company during

the said year was not running or interested in any special fast, through, or other stock, coal or refrigerator-car freight line, or doing business in or running cars over any of the railroads of said state of Michigan otherwise than as in the preceding paragraphs stated.

"*Fifth.* That prior to the first day of April, A. D. 1884, the Commissioner of Railroads of the state of Michigan transmitted to the said transportation company certain blank forms of a report to be made to him pursuant to the provisions of an act of the legislature of the state of Michigan approved June 5, 1883, entitled 'An Act to provide for the taxation of persons, copartnerships, associations, car-loaning companies and fast freight lines engaged in the business of running cars over any of the railroads of this state, and not being exclusively the property of any railroad company paying taxes on their gross receipts,' with the requirement that the said transportation company should make up and return said report to the office of said commissioner on or before the first day of April, 1884, under the penalties of said act; that on or about said first day of April, in compliance with said demand, but protesting that the same was without authority of law, and that said act was invalid — or, if valid, was not applicable to the said transportation company — the said transportation company made and filed with said commissioner a report, duly verified, setting forth that the gross amount of the receipts of the said transportation company for the mileage of said cars during said year 1883, while in use in the transportation of freight between points without said state and passing through said state in transit, estimated and pro-rated according to the mileage of said cars within said state of Michigan while so in use, was the sum of $95,714.50; and while in the use of transportation of freight from points without to points within said state of Michigan, and from points within to points without said state, estimated and pro-rated according to the mileage of said cars within the state of Michigan while so in use, was the sum of $28,890.01, making in the aggregate the sum of $124,604.51; that during said year it received no moneys whatever on business done solely

within the state of Michigan, and no moneys which were or could be regarded as earned during said year within the limits of said state of Michigan other than as hereinbefore and in said report set forth.

"*Sixth.* That by the terms of said act it is the duty of said Commissioner of Railroads to make and file with the Auditor General of said state of Michigan, prior to the first day of June each year, a computation based upon the report of each person, association, copartnership or corporation taxable thereunder of the amount of tax to become due from them respectively, and each such person, association, copartnership or corporation is required on or before the first day of July in such year to pay to the Treasurer of said state of Michigan upon the statement of the Auditor General thereof two and one-half per cent. upon its gross receipts as computed by the said Commissioner of Railroads and derived from loaning, renting or hiring of cars to any railroad or other corporation, association, copartnership or party. It was also provided in said act that for the said taxes and interest thereon, and the penalty imposed for delay in the payment thereof, the said state should have a lien upon all the property of the person, association, copartnership or corporation so taxed, and in default of the payment of said tax by and within the time so prescribed the Auditor General of said state was authorized to issue his warrant to the sheriff of any county in said state, commanding him to levy the same, together with ten per cent. for his fees, by distress and sale of any of the property of the corporation or party neglecting or refusing to pay such tax wherever the same may be found within the county or state.

"*Seventh.* That the said Commissioner of Railroads has computed and determined that the amount of the gross receipts of the said transportation company under the said act is the said sum of $28,890.01, and that there is due from said transportation company to the state of Michigan, as a tax thereon, the sum of $722.25, and has transmitted said computation to the said Auditor General, and your orator shows that unless said tax is paid by the said transportation company on or be-

fore the first day of July, 1884, it will become the duty of the said Auditor General under the said act and the said Auditor General threatens that he will proceed to enforce payment of the said tax against said transportation company by the seizure and sale of the property of said transportation company under the provisions of said act.

"*Eighth.* That your orator is advised and so charges, that the said act as to the said gross receipts of the said transportation company, or of any of its receipts or earnings from the use of its cars, within the state of Michigan, and the transaction of its business in the manner aforesaid, is in violation of the Constitution of the United States and void, and that said act is inapplicable to the said transportation company, and inoperative for further reasons appearing upon its face, and that said transportation company is not amenable thereto.

"*Ninth.* That the chief officers of the said transportation company for the transaction of corporate business was, during said year, and is in the city of New York, in the state of New York, and that all the moneys earned by it, as set forth in the second and third paragraphs hereof, were paid to it at its said office; that said company during said year had no funds or property whatsoever within the state of Michigan, except cars in transit and office furniture in the possession of agents, and that during said year the said transportation company was subject to taxation and was taxed on account of its property and earnings within and under the laws of the state of New York."

The bill then prayed for a subpœna against William C. Stevens, Auditor General of the State of Michigan, and for an injunction to prevent him from proceeding in the collection of said taxes. To this bill the defendant Stevens demurred, and the Circuit Court for the county of Washtenaw, in which this suit was brought, overruled that demurrer. From this decree the defendant appealed to the Supreme Court of the state, where the judgment of the lower court was reversed, the demurrer sustained, and the bill dismissed. To reverse that decree this writ of error was sued out.

Argument for Defendant in Error.

Mr. Ashley Pond for plaintiff in error.

Mr. Moses Taggart, Attorney General of Michigan, and *Mr. Edward Bacon* for defendant in error.

This court has discretionary power to decide this case as any reason deemed sufficient may require. The tax in question is valid for the following reasons.

I. The tax is on business done in the exercise of corporate franchises, introduced by permission of the state of Michigan. The tax is on such business done by means of the complainant's permanently established local agents and offices in Michigan, with every facility for carrying on business between places within the state, whenever profitable. The tax is necessary to the safety of the state's revenue from railroad companies and express companies. The tax is upon railroad business so affecting and controlling public interests of the people of the state of Michigan that such business ought not to escape taxation in the state.

II. The opinion of the Supreme Court of Michigan in this suit states a claim by the complainant's counsel that the tax in question is void if it is laid "upon the gross earnings of the company within the state, as specific property, because the earnings or assets are not within the jurisdiction of the state." Here is presented a statement of a matter of fact — the place of the earnings. The complainant ought not to escape taxation in Michigan merely because the final receipt of its earnings in Michigan was at its chief office in the city of New York. The business, by which all right to such earnings accrued, was completed within the state of Michigan, and, according to the ordinary course of such business, any suit to collect such earnings must be brought in Michigan, where the contracts therefor were made and fulfilled. And, according to the ordinary course of such business, the payments of the freight charges, in which the complainant was part owner, were made in Michigan, although the railroad companies or other common carriers may have carried the money to New York before final division thereof, and the real collec-

tion of the earnings in Michigan was in Michigan continuously. *Railroad Co.* v. *Collector*, 100 U. S. 595, 598; *United States* v. *Erie Railway Co.*, 106 U. S. 327, 330.

If final receipt at the home office in New York, of earnings in Michigan, must deprive the latter state of all power to tax such earnings, then all insurance companies and express companies can claim for their earnings in Michigan, immunity from taxation there, if such earnings be not finally receipted for until they arrive in a foreign state. If the Supreme Court of Michigan has decided that the claim of the complainant's counsel was wrong, and that the earnings in question were taxable in Michigan, where they were bargained for and collected, it is difficult to understand what statutory or constitutional provision of the United States was thereby infringed upon. The transcript certainly specifies none so infringed upon. And it is difficult to understand why the decision of the Supreme Court of Michigan, on this matter shall not be final.

III. If the plaintiff could use, in Michigan, its located agencies, its corporate franchises, or its control of the freighting business, so that the Supreme Court of Michigan might in this case rightfully adjudge that the complainant's business was taxable there, then the adjudication of such Supreme Court in this suit, that such business was so taxable, is final, and no Federal question is of any importance in this suit.

In *Murdoch* v. *City of Memphis*, 20 Wall. 590, it is said at p. 636, "If it" [the Federal question] "was erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue." *Bonaparte* v. *Tax Court*, 104 U. S. 592, 595. *Norton* v. *Shelby County*, 118 U. S. 425; *Erie Railway* v. *Pennsylvania*, 21 Wall. 492, 497.

IV. No Federal question, not duly specified by the record,

in or prior to the decree of the court below, can be considered. *Maxwell* v. *Newbold*, 18 How. 511.

If this claim for immunity is to be successful, then there will be nothing to hinder any person or corporation in New York from having like immunity from taxation for all receipts from any kind of business carried on in Michigan, if collections be made through a joint owner or partner there, but the final division of such receipts shall be in New York. *Messenger* v. *Mason*, 10 Wall. 507, 509; *Simmerman* v. *Nebraska*, 116 U. S. 54.

The complainant must be deemed a corporation exercising, in its business, corporate franchises introduced by permission of the state of Michigan. Lindley on Partnership, Ewell's ed., Chicago, 1881, Vol. 2, pp. 1087–8–9, giving copies of relevant N. Y. Statutes and Articles of Constitution. *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, 574; *Westcott* v. *Fargo*, 61 N. Y. 542; *Fargo* v. *Louisville, New Albany & Chicago Railway*, 6 Fed. Rep. 787; *Waterbury* v. *Merchants' Union Express Co.*, 50 Barb. 157; *Sandford* v. *Supervisors*, 15 How. Pr. 172; *Habicht* v. *Pemberton*, 4 Sandford (N. Y.) 657; *United States Express Co.* v. *Bedbury*, 34 Ill. 459.

Mr. Justice Miller, after stating the case as above reported, delivered the opinion of the court.

The contention of the plaintiff in error is, that the statute of Michigan, the material parts of which are recited in the bill, is void as a regulation of commerce among the states, which, by the Constitution of the United States, is confided exclusively to Congress. Art. 1, § 8, clause 3. It will be observed that the bill shows that the tax finally assessed by the auditor of state against the transportation company was for the $28,890.01 of the gross receipts which the company had returned to the commissioner as money received for the transportation of freight from points without to points within the state of Michigan, and from points within to points without that state, and that no tax was assessed on the $95,714.50 received for transportation, passing entirely through the state to and from other states.

There is nothing in the opinion of the Supreme Court of the state, which is found in the transcript of the record, to explain this discrimination. There is nothing in the statute of the state on which this tax rests which makes such a distinction, nor is there anything in the commissioner's requirement for a report which suggests it. It must have been, therefore, upon some idea of the authorities of the state that the one was interstate commerce and the other was not, which we are at a loss to comprehend. Freight carried from a point without the state to some point within the state of Michigan as the end of its voyage, and freight carried from some point within that state to other states, is as much commerce among the states as that which passes entirely through the state from its point of original shipment to its destination. This is clearly stated and decided in the case of *The Reading Railroad Co.* v. *Pennsylvania*, commonly called the *Case of the State Freight Tax*, 15 Wall. 232, in which it is held that a tax upon freight taken up within the state and carried out of it, or taken up without the state and brought within it, is a burden on interstate commerce, and therefore a violation of the constitutional provision that Congress shall have power to regulate commerce with foreign nations and among the several states. And in *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557, it is held that a statute attempting to regulate the rates of compensation for transportation of freight from New York to Peoria, in the state of Illinois, or from Peoria to New York, is a regulation of commerce among the states. The same principle is established in *Crandall* v. *State of Nevada*, 6 Wall. 35.

The statute of the state of Michigan of 1883, under which this tax is imposed, is entitled "An act to provide for the taxation of persons, copartnerships, associations, car-loaning companies, corporations, and fast freight lines engaged in the business of running cars over any of the railroads of this state, and not being exclusively the property of any railroad company paying taxes on their gross receipts." Sections 1 and 2 require reports to be made to the Commissioner of Railroads of the gross amount of their receipts for freight earned within the limits of the state from all persons and corporations run-

ning railroad cars within the state. The commissioner is by § 4 required to make and file with the Auditor General, on the first day of June of each year, a computation of the amount of tax which would become due on the first day of July next succeeding from each person, association, or corporation liable to pay such taxes. Each one of these is by § 5 required to pay to the State Treasurer, upon the statement of the Auditor General, an annual tax of two and one-half per cent. upon its gross receipts, as computed by the commissioner of railroads.

It will thus be seen that the act imposed a tax upon all the gross receipts of the Merchants' Dispatch Transportation Company, a corporation under the laws of the state of New York, and with its principal place of business in that state, on account of goods transported by it in the state of Michigan; and the bill states that the company carried no freight the transportation of which was between points exclusively within that state.

The subject of the attempts by the states to impose burdens upon what has come to be known as interstate commerce or traffic, and which is called in the Constitution of the United States "commerce among the states," by statutes which endeavor to regulate the exercise of that commerce, as to the mode by which it shall be conducted, or by the imposition of taxes upon the articles of commerce, or upon the transportation of those articles, has been very much agitated of late years. It has received the attentive consideration of this court in many cases, and especially within the last five years, and has occupied Congress for a time quite as long. The recent act, approved February 4, 1887, entitled "An act to regulate commerce," passed after many years of effort in that body, is evidence that Congress has at last undertaken a duty imposed upon it by the Constitution of the United States, in the declaration that it shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Congress has freely exercised this power so far as relates to commerce with foreign nations and with the Indian tribes, but in regard to commerce among the several states it has, until this act, refrained from the passage

of any very important regulation upon this subject, except perhaps the statutes regulating steamboats and their occupation upon the navigable waters of the country.

With reference to the utterances of this court until within a very short time past, as to what constitutes commerce among the several states, and also as to what enactments by the state legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all of the judges of the court who have written opinions for it may not have meant precisely the same thing. Still we think the more recent opinions of the court have pretty clearly established principles upon that subject which can be readily applied to most cases requiring the construction of the constitutional provision, and that these recent decisions leave no room to doubt that the statute of Michigan, as interpreted by its Supreme Court in the present case, is forbidden as a regulation of commerce among the states, the power to make which is withheld from the state.

The whole question has been so fully considered in these decisions, and the cases themselves so carefully reviewed, that it would be doing little more than repeating the language of the arguments used in them to go over the ground again. The cases of the *State Freight Tax* and *State Tax on Railway Gross Receipts*, which were considered together and decided at the December term, 1872, and reported in 15 Wallace, pp. 232–328, present the points in the case now before us perhaps as clearly as any which have been before this court. A statute of the state of Pennsylvania imposed upon all the railroad corporations doing business within that state, as well as steamboat companies and others engaged in the carrying trade, a specific tax on each two thousand pounds of freight carried, graduated according to the articles transported. These were arranged into three classes, on the first of which a tax of two cents per ton was laid, upon the second three cents, and upon the third five cents. The Reading Railroad Company, a party to the suit, in making its report under this statute, divided its freight on which the tax was to be levied into two classes,

namely, freight transported between points within the state and freight which either passed from within the state out of it or from without the state into it. The Supreme Court of the state of Pennsylvania decided that all the freight carried without regard to its destination, was liable to the tax imposed by the statute. This court, however, held that freight carried entirely through the state from without, and the other class of freight brought into the state from without or carried from within to points without, all came under the description of "commerce among the States," within the meaning of the Constitution of the United States; and it held also that freight transported from and to points exclusively within the limits of the state, was internal commerce and not commerce among the states. The taxing law of the state was, therefore, valid as to the latter class of transportation, but with regard to the others it was invalid, because it was interstate commerce and the state could lay no tax upon it. In that case which was very thoroughly argued and very fully considered, the case of *Crandall* v. *Nevada*, 6 Wall. 35, was cited as showing, in regard to transportation, what was strictly internal commerce of a state and what was interstate commerce. The court said: "Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they *are* carried, is a regulation of carriage. The state may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the state. Nor is a rule prescribed for carriage of goods through, out of, or into a state any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a state may regulate its internal commerce as it pleases. If a state chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another state the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the state." pp. 276, 277.

In the case of the *Erie Railway Company* (a corporation of the state of New York) v. *Pennsylvania*, 15 Wall. 282, decided at the same time, it appeared that the road of that company was constructed for a short distance through a part of the state of Pennsylvania, and that a similar tax was levied upon it for freight carried over its road. This was held to be invalid for the reasons given in the case of the Reading road.

In the other case of *State Tax on Railway Gross Receipts*, 15 Wall. 284, which was also a suit between the Reading Railway Company and the state of Pennsylvania, an act of the legislature of that state was relied on which declared that "In addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semiannually upon the first days of July and January, commencing on the first day of July, 1866."

This tax was held to be valid. The grounds upon which it was distinguished from the one in the preceding case upon freight were, that the corporation, being a creation of the legislature of Pennsylvania and holding and enjoying all its franchises under the authority of that state, this was a tax upon the franchises which it derived from the state, and was for that reason within the power of the state, and that, in determining the mode in which the state could tax the franchises which it had conferred, it was not limited to a fixed sum upon the value of them, but it could be graduated by and proportioned to either the value of the privileges granted, or the extent or results of their exercise. "Very manifestly," said the court, "it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised," p. 234. Another reason given for the distinction is that "the tax is not levied, and, indeed, such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's hands.

Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a state to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country." pp. 294, 295, citing *Brown* v. *Maryland*, 12 Wheat. 519.

The distinction between that case, which is mainly relied upon by the Supreme Court of Michigan in support of its decree, and the one which we now have before us, is very obvious, and is twofold: First. The corporation which was the subject of that taxation was a Pennsylvania corporation, having the *situs* of its business within the state which created it and endowed it with its franchises. Upon these franchises thus conferred by the state, it was asserted, the state had a right to levy a tax. Second. This tax was levied upon money in the treasury of the corporation, upon property within the limits of the state, which had passed beyond the stage of compensation for freight and had become like any other property or money liable to taxation by the state. The case before us has neither of these qualities. The corporation upon which this tax is levied is not a corporation of the state of Michigan, and has never been organized or acknowledged as a corporation of that state. The money which it received for freight carried within the state probably never was within the state, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it was neither money nor property of the corporation within the state of Michigan.

The proposition that the states can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up

as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the states or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the states, by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way.

This is illustrated in the case of *Cook* v. *Pennsylvania*, 97 U. S. 566. The state of Pennsylvania, by her laws, had laid a tax upon the amount of sales of goods made by auctioneers, and had so modified and amended this class of taxes that in the end it remained a discriminating tax upon goods so sold imported from abroad. This court held that the tax which the auctioneer was required to pay into the treasury was a tax upon the goods sold, and as this tax was three-quarters of one per cent. upon foreign drugs, glass, earthenware, hides, marble work and dyewoods, that it was a tax upon the goods so described for the privilege of selling them at auction. The argument was made that this was a tax exclusively upon the business of the auctioneer which the state had a right to levy. In that case, as in others, it was claimed that the privilege of being an auctioneer derived from the state by license, was subject to such taxation as the state chose to impose, but the proposition was overruled; and this court held that the tax was a regulation of commerce with foreign nations, and that the fact that it was a tax upon the business of an auctioneer did not relieve it from the objection arising from the constitutional provision.

The same question arose in the case of *The Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. That company was a corporation chartered by the state of New Jersey to run a ferry carrying passengers and freight between the town of Gloucester, in that state, and the city of Philadelphia, in the state of Pennsylvania. It had no property within the state of Pennsylvania, but it leased a landing-place or wharf

in that city for its business. The Auditor General and Treasurer of the state of Pennsylvania assessed a tax upon the capital stock of this corporation under the laws of that state, which the company refused to pay. Its validity was sustained by the state Supreme Court, and the question was brought to this court by a writ of error. It was insisted that the tax was justified as a tax upon the business of the corporation, which, it was claimed, was largely transacted in the city of Philadelphia. The Supreme Court of the state, in giving its decision, stated that the single question presented for consideration was, whether the company did business within the state of Pennsylvania within the period for which the taxes were imposed; and it held that it did, because it received and landed passengers and freight at its wharf in the city of Philadelphia. The argument was very much urged in this court that the licensing of ferries across navigable rivers, whether dividing two states or otherwise, had always been within the control of the states, and that this, being a mere tax upon the business of that corporation carried on largely within the state of Pennsylvania, was within the power of that state to regulate. But this court held, after an extensive review of the previous cases, that the business of ferrying across a navigable stream between two states was necessarily commerce among the states, and could not be taxed as was attempted in that case.

In the case of *Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34, decided at the last term of the court, it was shown that the legislature of Tennessee had imposed what it called a privilege tax under the constitution of that state of fifty dollars per annum upon every sleeping-car or coach run or used upon a railroad in that state, not owned by the railroad company so running or using it. This, it will be perceived, is very much like the tax in the case before us, except that it is a specific tax of fifty dollars per annum upon the car instead of a tax upon the gross receipts arising from the use of the car by its owner. In that case, after an exhaustive review of the previous decisions in this class of cases by Mr. Justice Blatchford, who delivered the opinion of the court, it

was held that, as these cars were not property located within the state, it was a tax for the privilege of carrying passengers in that class of cars through the state, which was interstate commerce, and for that reason the tax could not be sustained.

Two cases have been decided at the present term of the court in which these questions have been considered, one of them at least involving the subject now under consideration, namely, that of *Robbins* v. *Taxing District of Shelby County*, 120 U. S. 489. A statute of that state declared that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of ten dollars per week, or twenty-five dollars per month, for such privilege." Robbins was prosecuted for a violation of this law, and on the trial it appeared that he was a resident and a citizen of Cincinnati, Ohio, who transacted the business of drumming in the taxing district of Shelby County, that is, soliciting trade by the use of samples, for the firm by which he was employed, whose place of business was in Cincinnati, and all the members of which were residents and citizens of that city. It was argued in that case, as in the others we have just considered, that the state had a right to tax the business of selling by samples goods to be afterwards delivered, and to impose a tax upon the persons called drummers engaged in that business. It was further insisted that, since the license tax applied to persons residing within the state as well as to those who might come from other states to engage in that business, that it was not a tax discriminating against other states, or the products of other states, and was valid as a tax upon that class of business done within the state. The whole subject is reconsidered again in this case by Mr. Justice Bradley, who delivered the opinion of the court, in which it is held that the business in which Robbins was engaged, namely, that of selling goods by sample, which were in the state of Ohio at the time and were to be delivered in the city of Memphis, Tennessee, constituted interstate commerce, and that, so far as this tax was to be imposed upon Robbins for doing that kind of

business, it was a tax upon interstate commerce, and therefore not within the power of the state to enforce.

In the case of *Wabash Railway Co.* v. *Illinois*, 118 U. S. 557, the question presented related to a statutory regulation of that state as to compensation for carrying freight. It was held by the Supreme Court of Illinois to embrace all contracts for transportation by railroad which came into or went out of the state, as well as that which was wholly within its limits, and although the controversy did not arise in regard to a *tax* upon interstate commerce, yet the general question was fully considered as to what was interstate commerce and what was commerce exclusively within the state, and how far the former could be thus regulated by a statute of a state. This court held in that case that no statute of a state in regard to the transportation of goods over railroads within its borders, which was a part of a continuous voyage to or from points outside of that state, and thus properly interstate commerce, could regulate the compensation to be paid for such transportation; that the carriage of passengers or freight between different points is commerce, and except where that is wholly and exclusively within the limits of a state it is not subject in its material features to be regulated by the state legislature.

In many other cases, indeed, in the three last cases mentioned, the whole subject has been fully examined and considered with all the authorities, and especially decisions of this court relating thereto. The result is so clearly against the statute of Michigan, as applied by its Supreme Court, that we think the judgment of that court cannot stand.

The decree of the Supreme Court of Michigan is reversed, with directions for further proceedings in accordance with this opinion.

COVINGTON STOCK-YARDS COMPANY *v.* KEITH.

ORIGINAL MOTION IN A CASE PENDING ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

Submitted April 4, 1887. — Decided April 11, 1887.

The provision in Rev. Stat. § 1007, that if a plaintiff in error "desires to stay process he may, having served his writ of error as" directed in the Revised Statutes, "give the security required by law within sixty days after the rendition of judgment, or afterwards with the permission of a justice or judge of the appellate court," applies to an appeal from a final decree against an intervenor in a suit in equity when a partial supersedeas is granted below, and furnishes a reason why a motion on his behalf for a full supersedeas should be denied here.

THE trustees in a mortgage of the Kentucky Central Railroad filed their bill in the Circuit Court of the United States for Kentucky to foreclose the mortgage, and the court appointed a receiver. The defendants in error intervened, setting forth that they were engaged in the business of buying and selling live stock, and that they were the proprietors of stock yards near said railroad, and adjoining the stock yards of the Covington Stock-Yards Company, the plaintiff in error; that before the commencement of the suit the railroad company and the plaintiff in error entered into a contract for the loading and unloading by the latter of all stock transported by the railroad company; that they agreed with the receiver that they would construct a platform suited to receive the stock for their own yard, and the receiver agreed to deliver it at the platform; that the stock company thereupon obtained from a state court of Kentucky an injunction against them to prevent them from erecting the platform, but that the suit in which it was granted had been discontinued; that the receiver nevertheless continued to deliver stock for them through the yards of the stock company, and that they were unable to get possession of it without payment of lotage to the company. The petition closed with a prayer for a rule on the receiver to show cause why he should not deliver to the petitioners their

stock outside of the yards of the stock company, free from charge, other than the customary charges for transportation.

The receiver having answered, the court granted in substance the prayer of the petitioners, but further granted leave to the stock-yard company to file an intervening petition to litigate the rights of the company, making the company and the defendants in error parties. This the company did, fixing their damages at $10,000. After hearing, the court among other things "ordered and decreed that the said railroad company and said receiver shall hereafter receive and deliver from and to the said Keith & Wilson at and through the said Covington Stock Yards all such live stock as may be brought to them or offered by them for shipment over said road and its connections, upon the consent of said stock yards, in writing, that it may be so done, being filed in this court and cause on or before the 1st day of January next after the entry of this decree, free of any charge for passing through said yards to and from the cars of said railroad company. In default of such consent being so filed, it is ordered and decreed that upon said Keith & Wilson putting the platform and chute erected by them on the land of said Keith adjacent to the live-stock switch of said railroad company north of said stock yards, the said railroad company and said receiver shall receive and deliver all such live stock to said Keith & Wilson as shall be consigned to them or either of them, or be offered by them or either of them for shipment at said platform."

This decree was entered December 22, 1886. The stock-yard company at once appealed, and on the 25th of January, 1887, filed their appeal bond in the sum of $2500, whereupon on the same day the court after decreeing that the stock-yard company should pay to Keith $1209.19, illegally exacted, further made the following order:

"It is ordered that the appeal bond heretofore tendered by the Covington Stock-Yards Company in the cause on its appeal from the decree on the interpleader between said Covington Stock-Yards Company and Charles W. Keith and Edward W. Wilson be, and the same is, accepted, approved, and filed, but the same is to operate only as a supersedeas to the extent of

the judgment rendered against said Covington Stock-Yards Company, and not further or otherwise, and particularly is not to operate as a supersedeas so far as concerns any order, decree, or judgment directed to the receiver herein affecting the receipt, delivery, or shipment to or by said Keith and Wilson of live stock on or over the line of said railroad and its connections."

To all of the foregoing order, except so much as accepted, approved, and filed said appeal bond, the said Covington Stock-Yards Company excepted.

The appeal being docketed here, the stock-yards company moved that the entire decree be superseded and stayed until the determination of the appeal.

Mr. J. G. Carlisle and *Mr. T. F. Hallam* for the motion.

Mr. Chief Justice Waite delivered the opinion of the court.

The qualified acceptance of the bond given on this appeal shows that the judge who took it considered the security only sufficient for a stay of the execution of that part of the decree appealed from, which was for the payment of money. Under these circumstances the appeal only operates as a supersedeas to that extent. As the appeal was taken within sixty days after the rendition of the decree, Mr. Justice Matthews, the justice of this court, assigned to the Sixth Circuit, has power, under § 1007 of the Revised Statutes, to grant, in his discretion, a further stay of execution, if application to him for that purpose is made. For this reason

The present motion is denied.

PENN v. CALHOUN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Submitted March 30, 1887. — Decided April 11, 1887.

In a suit for foreclosing a railroad mortgage, the court being satisfied that money loaned the railroad company by a bank, an intervening creditor, at a time when the company was much embarrassed, and shortly before the commencement of the suit, went into the general funds of the company, and not especially to the payment of mortgage interest, and that there was no fraud or deception on the part of the trustees, and no misuse of current income by the receiver of the road to the injury of the bank; *Held*, that the bank had only the rights of a general creditor in the distribution of the proceeds from the sale of the mortgaged property.

This was an appeal from a decree dismissing the petition of an intervening creditor in a foreclosure suit. The case is stated in the opinion of the court.

Mr. Charles Wait Thomas for appellant.

No appearance for appellee.

Mr. Chief Justice Waite delivered the opinion of the court.

This is an appeal from an order dismissing a petition of intervention filed in a suit for the foreclosure of mortgages of the Southeastern Railway Company, asking payment from the proceeds of the sale of the mortgaged property of a debt of $40,000 and interest, due from the company to the People's Bank of Belleville for money lent. The case as presented here places the right of recovery entirely on the following grounds: 1. That the money was lent with the knowledge and consent of the mortgage trustees to pay mortgage interest, and that it was actually used for that purpose, the earnings at the time being insufficient to meet both interest and expenses; 2. That the company was wholly insolvent when the loan was made, which was unknown to the bank,

but known to the trustees, and for this reason the money ought to be restored to the bank from the proceeds of the sale of the mortgaged property; and 3, That the net earnings for the year during which the loan was made were used to pay interest on the mortgage debt and to make permanent and lasting improvements on the mortgaged property, instead of paying current debts.

The evidence shows that when the bank took the note which is the basis of the present claim, $80,000 of the bonds of the consolidated mortgage, under which, with an earlier mortgage, the decree of foreclosure was had, were pledged by the company as security, and it fails entirely to satisfy us that any part of the money lent was used directly in the payment of mortgage interest. There is no doubt that the company was heavily in debt when the loan was made, and that it was struggling to maintain its credit, so as to float its consolidated bonds which were then on the market for sale. The money lent was put into the general fund in the treasury of the company and used like the rest to pay debts which were pressing. We are entirely satisfied that the bank expected to be paid out of the proceeds of the sales of the bonds, and not from the earnings. The current earnings were used, as it was supposed they would be, to make permanent and lasting improvements, buy additional rolling-stock, and keep down the interest on the early mortgages, so as to bolster up the credit of the company and make its consolidated bonds marketable. For its ultimate security the bank relied on the indorsers of the note and the bonds, which were specially pledged for that purpose. There is not a particle of evidence to show any fraud or deception on the part of the trustees, and neither the current income of the receivership nor that of the company has been employed in a way to deprive the bank of any of its equitable rights. The bank is, therefore, not entitled to payment out of the proceeds of the sale of the mortgaged property in preference to the bondholders. It occupies the position of a general creditor only. *Fosdick* v. *Schall*, 99 U. S. 255.

The decree of the Circuit Court dismissing the petition of intervention is affirmed.

MENARD *v.* GOGGAN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

Submitted April 1, 1887. — Decided April 11, 1887.

It is again held that when the jurisdiction of a Circuit Court depends alone on citizenship, an averment that the plaintiff is a "resident" in one state named, and that the defendant is a "resident" in another state named confers no jurisdiction; and a judgment rendered below in such case in favor of the defendant and brought up in error by the plaintiff, is reversed with costs in this court against the plaintiff in error.

THE case is stated in the opinion of the court.

Mr. John W. Butterfield for plaintiff in error.

No appearance for defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This record does not show that the Circuit Court had jurisdiction of the suit which depended alone on the citizenship of the parties. The petition states that Edmund Menard, the plaintiff, "resides in Randolph County, in the state of Illinois," and that the defendants, of whom Thomas Goggan, the defendant in error, was one, "reside in the city of Galveston," in the state of Texas. There is nothing else from which the citizenship of either party can be inferred, and this is not enough. We have so held at the present term in *Continental Insurance Company* v. *Rhoads*, 119 U. S. 237, where the authorities are cited; *Halsted* v. *Buster*, 119 U. S. 341, and *Everhart* v. *Huntsville College*, 120 U. S. 223. This judgment must, therefore, be reversed on the authority of those cases, and as the fault rests with the plaintiff in error, whose duty it was when bringing the suit to make the jurisdiction appear, the reversal will be at his costs in this court. *Hancock* v. *Holbrook*, 112 U. S. 229; *Halsted* v. *Buster*, *supra*. If the necessary citizenship

actually existed at the time the suit was begun, it will be for the court below to determine, when the case gets back, whether the record shall be amended so as to show that fact, and thus make out the jurisdiction.

The judgment of the Circuit Court is reversed at the costs of the plaintiff in error, and the cause remanded for further proceedings.

UNITED STATES *v.* PHILLIPS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

Argued April 4, 1887. — Decided April 11, 1887.

Notice of a writ of error, given in open court at the same term the judgment is rendered, is not the equivalent of citation.

THE case is stated in the opinion of the court.

Mr. Assistant Attorney General Maury for plaintiff in error.

No appearance for defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

In this case no citation was ever issued, and the defendants in error do not appear. Notice of a writ of error, given in open court at the same term the judgment is rendered, is not the equivalent of the citation required by § 999 of the Revised Statutes. In this respect writs of error differ from appeals taken in open court.

The writ of error is dismissed.

CLEVELAND ROLLING MILL *v.* RHODES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued March 29, 1887. — Decided April 11, 1887.

A merchant agreed in writing with the owner of a rolling mill to sell him "the entire product of 14,000 tons iron ore, to be manufactured into pig iron with charcoal" at the furnace of a third person, "and shipped in vessel cargoes, as rapidly as possible, during the season of navigation of 1880," to the buyer's mill, and "such portion of the product of said ore, as is made after the close of navigation of 1880, is to be shipped on the opening of navigation of 1881, or as near the opening as possible," but the buyer to have the privilege of ordering this portion to be forwarded by railroad during the winter of 1880–81. The whole amount of pig iron made from the 14,000 tons of ore was 8000 tons, of which 3421 tons were shipped before the close of navigation in 1880, and accepted and paid for. For want of a sufficient supply of charcoal to keep the furnace at work, only 3506 tons more were made and ready for shipment by the opening of navigation in 1881, and were then shipped as soon as possible; and the remaining 1073 tons were made afterwards, and shipped from time to time during the ensuing two months. *Held*, that the buyer might refuse to accept the iron shipped in 1881.

This was an action brought by Rhodes and Bradley, copartners, and citizens of Chicago in the State of Illinois, against the Cleveland Rolling Mill Company, a corporation of the State of Ohio, upon the following agreement in writing, signed by both parties:

"This agreement, made this sixteenth day of February, 1880, by and between Rhodes & Bradley, of Chicago, Ill., and the Cleveland Rolling Mill Co., of Cleveland, Ohio, witnesseth: That said Rhodes & Bradley have sold to the said Cleveland Rolling Mill Co. the entire product of fourteen thousand (14,000) tons iron ore, to be manufactured into pig iron with charcoal by the Leland Furnace Co., of Leland, Mich., said furnace to make as nearly all numbers one and two iron as possible, and to be shipped in vessel cargoes as rapidly as possible to the Cleveland Rolling Mill Co., at Cleveland, Ohio, during the season of navigation of 1880. Such portion

of the product of said ores, as is made after the close of navigation of 1880, is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible; said Cleveland Rolling Mill Co. to have the privilege of ordering the iron, which may be made too late for shipment by lake during the season of 1880, through by rail to Cleveland during the winter of 1880 and 1881, they to pay the additional expense of hauling to railroad and freighting through to Cleveland by rail, over and above what it would cost Rhodes & Bradley to ship by lake on the opening of navigation 1881.

"Said Cleveland Rolling Mill Co. agree to receive said iron as rapidly as shipped, and to pay forty-five dollars ($45) per ton (2,240 lbs.) cash for same delivered on rail or vessel at Cleveland, Ohio. The Cleveland Rolling Mill Co. are to have the option of taking a portion of the iron delivered at Chicago, Ill., at the same price and on the same terms and conditions as stated above for delivery in Cleveland, said Cleveland Rolling Mill Co. to furnish good and suitable dock at which to unload vessels, either at Cleveland or Chicago, and to pay vessels any demurrage which they may be justly entitled to by reason of delay in furnishing a dock at which they can be discharged.

"The iron ore to be furnished at the Leland Iron Co., out of which said iron is to be manufactured, is as follows:

"6000 tons Cleveland mine.

"5000 tons Norway mine.

"1500 tons Rolling Mill mine.

"1500 tons Stephenson mine.

"And whereas Rhodes & Bradley's contracts with said mining companies are to the effect that in case of accidents or strikes at said mines, resulting in reduced output of ore, said companies are to have the privilege of reducing the amounts due Rhodes & Bradley, as above stated, in same proportion as other sales, the said Cleveland Rolling Mill Co. agree not to hold Rhodes & Bradley responsible for delivery of pig iron beyond the product of such ores as the mining companies deliver them; also, in case of accidents or strikes at said Leland furnace, resulting in the stoppage of said furnace,

then Rhodes & Bradley are not to be held responsible for delivery of pig iron under the contract, beyond the responsibility of the Leland Iron Co. to them under the contract between said Leland Iron Co. and Rhodes & Bradley, dated January 14, 1880, which contract, as well as Rhodes & Bradley's contracts with the mining companies, is hereby made a part of this agreement."

Prior to January 14, 1880, the plaintiffs had made agreements in writing with the owners of the four mines for the purchase of the amounts of ore above mentioned, to be delivered by them to the plaintiffs during the season of navigation in 1880. And on January 14, 1880, the plaintiffs made an agreement in writing with the Leland Iron Company, which was the owner and manager of a furnace at Leland in the State of Michigan, by which the plaintiffs agreed to sell to that company the same amounts of those ores respectively, "to be furnished, 1500 tons in May, 1880, navigation permitting, and 2500 tons each month thereafter as nearly as may be, and all to be delivered to vessel before November 1, 1880, and in suitable quantities of each for the mixtures desired by said Rhodes & Bradley;" and also agreed "to purchase the entire product of pig iron of the Leland furnace made from the ores so furnished, at the rate of $40 per ton, cash, delivered over the rail at Chicago, or $40.25, cash, at Cleveland, at the option of said Rhodes and Bradley, they to provide proper docking facilities for prompt unloading of vessels;" and the Leland Iron Company agreed "to manufacture pig iron from said ores as nearly as practicable of the grades which said Rhodes & Bradley shall desire, and to ship same in cargo lots as rapidly as possible after manufacture during season of navigation to said Rhodes & Bradley, to Chicago or Cleveland as aforesaid."

A jury was duly waived by stipulation in writing, and the case was tried by the court, which found specially that all the above contracts were executed and delivered by the parties thereto, and further specially found as follows:

"3. That the plaintiffs, between May 16 and October 18, 1880, delivered to the Leland Iron Company, at Leland, Mich-

igan, 14,168 tons of iron ore, of which 5980 tons were from the Cleveland mine, 4405 tons were from the Norway mine, 1478 tons were from the Rolling Mill mine, and 2305 tons were from the Stephenson mine.

"4. That the ores from the Stephenson mine and the ores from the Norway mine were alike in value and quality, and that Stephenson mine ore was equally as good and identical in quality and value with the ore from the Norway mine.

"5. That the Leland Iron Company proceeded, soon after such ores began to arrive at Leland, with proper diligence to manufacture said ores into pig iron, and ship the same in cargo lots as rapidly as possible after manufacture from Leland to Cleveland, Ohio, and there delivered the same to the defendant, and the defendant accepted and paid for the same; that before the close of navigation for the season of 1880 the Leland Iron Company had so manufactured and delivered to the defendant 3421 tons of said pig iron; that the defendant made no objection to the acceptance of said pig iron on said contract between the plaintiffs and the defendant, on the ground of the quality of said iron, or of undue delay in the execution of said contract.

"6. That the navigation between Leland and Cleveland and Chicago closed in the fall of 1880 about November 15; that the last cargo of iron was shipped from Leland on November 8, and although the Leland Iron Company had enough iron manufactured to have furnished another cargo of 502 tons by November 15, no vessel could be obtained by which to ship it that fall; that after the close of navigation the Leland Iron Company continued the manufacture of said ore into pig iron without unreasonable delay, and that after November 8, 1880, and up to and including February 28, 1881, the Leland Iron Company had made 2100 tons of pig iron from said ore, and by May 7, 1881, had manufactured and on hand ready for shipment about 3506 tons; that on May 7, 1881, the Leland Iron Company resumed the shipment of said iron in cargo lots to the defendant at Cleveland, and continued such manufacture and shipment in cargo lots as rapidly as possible, so that the entire product of said ore was manufactured and shipped

from Leland by and including July 2, 1881 ; all which cargoes arrived at Cleveland in due course, and were there tendered to the defendant, and the defendant refused to accept said pig iron or any part thereof and refused to pay for the same ; that if the average daily product of said furnace from November 8, 1880, to May 8, 1881, had been the same as the average daily product from May 18, to November 8, 1880, all said 14,000 tons of ore would have been made into pig iron by about May 10, 1881 ; but in fact the furnace was shut down for a time, and part of the time the blast was checked, for want of a sufficient supply of charcoal, so that about 1100 tons of said pig iron were made after May 8, 1881.

"7. That in the latter part of the month of February, and again about March 3, 1881, the defendant notified the plaintiffs that it would not accept, under said contract of February 16, 1880, any iron which was made from said ore after December 31, 1880 ; and that some time during the month of May, 1881, the defendant notified the plaintiffs that it would not accept any more iron from the plaintiffs under said contract.

"8. That the fair market price of said pig iron in the cities of Cleveland and Chicago during the months of March, April, May, June, and July, 1881, was $27 per ton ; that the total amount of iron manufactured from said 14,000 tons of iron [ore] and shipped by the Leland Company to the defendant after the opening of navigation in the spring of 1881 was 4579 tons ; and that the difference between the market value of $27 per ton and the contract price was $18 per ton, making a total difference on 4579 tons of $82,422."

The court rendered judgment upon the special findings for the plaintiffs in the sum of $82,422, and costs. 17 Fed. Rep. 426. The defendant excepted to the admission of evidence at the trial, to the refusal of the court to make certain special findings requested, and to the judgment for the plaintiffs ; and afterwards sued out this writ of error.

Mr. George F. Edmunds and *Mr. William E. Cushing*, for plaintiff in error, cited : *Norrington* v. *Wright*, 115 U. S. 188 ; *Filley* v. *Pope*, 115 U. S. 213 ; *Knickerbocker Insurance Co.* v.

Tolman, 80 Ill. 106; *Taylor* v. *Beck*, 13 Ill. 376; *Brawley* v. *United States*, 96 U. S. 168; *Tamvaco* v. *Lucas*, 1 El. & El. 581; *Tamvaco* v. *Lucas*, 1 El. & El. 592; *Rommel* v. *Wingate*, 103 Mass. 327; *Stevenson* v. *Burgin*, 49 Penn. St. 36; *Johnson* v. *Raylton*, 7 Q. B. D. 438; *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670; *Dingley* v. *Oler*, 117 U. S. 490; *Lovell* v. *St. Louis Ins. Co.*, 111 U. S. 264; *Hochster* v. *De La Tour*, 2 El. & Bl. 678; *Avery* v. *Bowden*, 5 El. & Bl. 714; *Reid* v. *Hoskins*, 5 El. & Bl. 729; *Frost* v. *Knight*, L. R. 7 Ex. 111; *Roper* v. *Johnson*, L. R. 8 C. P. 167; *Smoot's Case*, 15 Wall. 36.

Mr. Enoch Totten, (with whom was *Mr. J. M. Flower* on the brief,) for defendants in error, cited: *Reed* v. *Insurance Co.*, 95 U. S. 23; *Thorington* v. *Smith*, 8 Wall. 1; *United States* v. *Peck*, 102 U. S. 64; *Bradley* v. *Steam Packet Co.*, 13 Pet. 89; *Hopkins* v. *Hitchcock*, 32 L. J. (N. S.) C. P. 154; *King* v. *Parker*, 34 Law Times, 887; *Meincke* v. *Falk*, 61 Wis. 623; *Atwood* v. *Emery*, 1 C. B. (N. S.) 110; *Swaine* v. *Semans*, 9 Wall. 254; *Woods* v. *Miller*, 55 Iowa, 168; *Fort Scott* v. *Hickman*, 112 U. S. 150; *Exchange Bank* v. *Third National Bank*, 112 U. S. 276.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The original defendant duly pleaded, and has earnestly argued, that the plaintiffs did not perform their contract, in respect either to the nature of the thing furnished, or to its quantity, or to the time of delivery. The principal objections, each of which would require consideration if the decision of the case depended upon it, are as follows:

As to the nature of the thing: That the amounts of ore from each of the four mines named, delivered at the furnace and there manufactured into pig iron, differed from the amounts contracted for, the ores from three of the mines being respectively 20 tons, 595 tons and 22 tons less, and the ore from the fourth mine 805 tons more.

As to the quantity: That the plaintiffs tendered to the de-

fendant the product of 14,168 tons of ore, when the contract was for the product of 14,000 tons only.

As to the time of performance: That the pig iron was not made and shipped "as rapidly as possible;" and especially that so much of it as had not been made and shipped before the close of navigation in 1880 was not shipped "on the opening of navigation of 1881, or as near the opening as possible."

We have not found it necessary to consider the objections as to the kind of iron, or how far any such objections were waived by the defendant, or the effect of tendering too much, or yet the objections to the competency of evidence admitted at the trial, or the variance suggested between the declaration and the proof, because we are of opinion that the delay which took place in the making and shipment of so much of the pig iron as had not been made and shipped before the close of navigation in 1880 is fatal to the plaintiffs' right to maintain this action.

In a case decided upon much consideration at the last term, the general rule was stated as follows: "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington* v. *Wright*, 115 U. S. 188, 203. See also *Filley* v. *Pope*, 115 U. S. 213; *Pope* v. *Porter*, 102 N. Y. 366; *Rommel* v. *Wingate*, 103 Mass. 327.

When a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement; the seller does not perform his agreement, by shipping part of that amount at the time appointed and the rest from time to time afterwards;

and the buyer is not bound to accept any part of the iron so shipped.

In the case at bar, the plaintiffs were merchants at Chicago, and the defendant was the owner of a rolling mill at Cleveland. By the agreement between them, made in February, 1880, the plaintiffs sell to the defendant "the entire product of 14,000 tons iron ore, to be manufactured into pig iron with charcoal" at a certain furnace, "and to be shipped in vessel cargoes as rapidly as possible" to the defendant at Cleveland, "during the season of navigation of 1880," and "such portion of the product of said ores, as is made after the close of navigation of 1880, is to be shipped by vessel to Cleveland on the opening of navigation of 1881, or as near the opening as possible." The plaintiffs thus agree that all of the pig iron contracted for, that is not made and shipped before the close of navigation in 1880, shall be shipped as early in 1881 as navigation shall be open and vessels can be obtained. This implies that the whole of the ore shall be made into pig iron and ready for shipment as soon as navigation opens in 1881. The implication is confirmed by the further stipulation that the defendant shall have the privilege, upon paying the additional expense of transportation by land, "of ordering the iron, which may be made too late for shipment by lake during the season of 1880, through by rail to Cleveland during the winter of 1880 and 1881." In short, all the pig iron, not shipped before the close of navigation in 1880, is to be made before the opening of navigation in 1881, and to be then shipped as soon as vessels can be obtained, unless the defendant elects to have it previously forwarded by land.

The facts, as found by the court, bearing upon the question of the plaintiffs' performance of their agreement in this particular, are as follows: The whole amount of pig iron made from the 14,000 tons of ore was 8000 tons. Of these, 3421 tons were shipped in 1880, and accepted and paid for by the defendant. At the opening of navigation, early in May, 1881, there were manufactured and on hand ready for shipment only 3506 tons. The remaining 1073 tons were made afterwards, and the last cargo was not shipped until nearly two months after navigation opened.

Opinion of the Court.

The general statements in the sixth finding, that the owner of the furnace, after the close of navigation in 1880, "continued the manufacture of said ore into pig iron without unreasonable delay," and on the opening of navigation in 1881 resumed the shipment of iron to the defendant, "and continued such manufacture and shipment in cargo lots as rapidly as possible," are limited and controlled by the more precise statements in the same finding, that if the average daily product of the furnace had been the same from the close of navigation in 1880 to the opening of navigation in 1881, as it had been during the season of 1880, "all said 14,000 tons of ore would have been made into pig iron by about May 10, 1881; but in fact the furnace was shut down for a time, and part of the time the blast was checked, for want of a sufficient supply of charcoal, so that about 1100 tons of said pig iron were made after May 8, 1881."

The failure to have on hand a sufficient amount of charcoal to keep the furnace at work is not shown to have been due to "accidents or strikes," which were contingencies contemplated by all parties, and provided for in the contract sued on. But it was a state of things of which the plaintiffs assumed the risk by undertaking that the whole of the ore should be made into pig iron ready to be shipped as soon as possible after the opening of navigation in 1881.

After the contract for 8000 tons of pig iron had been partly performed on both sides in 1880, by the plaintiffs' having delivered, and the defendant's having accepted and paid for, 3421 tons of iron, then the thing which, by the terms of so much of the contract as was yet unperformed, the plaintiffs agreed to deliver, and the defendant agreed to take and pay for, was 4579 tons of pig iron, made and ready for shipment upon the opening of navigation in 1881, and then shipped as rapidly as possible; and the rights and duties of the parties as to the performance of this part of the contract were the same as if it had been the whole contract between them.

The true construction of the contract being that that amount of iron shall be ready to be shipped and be actually shipped as soon as navigation permits, "that is part of the description

of the subject matter of what is sold;" and "the plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered the thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the nonfulfilment of the contract." Lord Cairns, in *Bowes* v. *Shand*, 2 App. Cas. 455, 468; *Norrington* v. *Wright*, 115 U. S. 188, 209.

The necessary conclusion is that the defendant was justified in refusing to accept any of the iron shipped in 1881; and whether the notice, previously given by the defendant to the plaintiff, that it would not accept under the contract any iron made after December 31, 1880, might have been treated by the plaintiffs as a renunciation and a breach of the contract, need not be considered, because the plaintiffs did not act upon it as such. *Dingley* v. *Oler*, 117 U. S. 490, 503.

It conclusively appearing, upon the facts found by the court below, that the original plaintiffs cannot maintain their action, it is ordered, in accordance with the precedents of *Fort Scott* v. *Hickman*, 112 U. S. 150, and *Allen* v. *St. Louis Bank*, 120 U. S. 20, that the

Judgment be reversed, and the case remanded to the Circuit Court, with directions to enter judgment for the original defendant.

HINCKLEY *v.* PITTSBURGH BESSEMER STEEL COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Argued April 5, 1877. — Decided April 18, 1887.

The defendant agreed, in writing, to purchase from the plaintiff rails to be rolled by the latter, "and to be drilled as may be directed," and to pay for them $58 per ton. He refused to give directions for drilling, and, at his request, the plaintiff delayed rolling any of the rails until after the time prescribed for their delivery, and then the defendant advised the plaintiff that he should decline to take any rails under the contract: *Held*,

Statement of Facts.

(1) The defendant was liable in damages for the breach of the contract;
(2) The plaintiff was not bound to roll the rails and tender them to the defendant;
(3) The proper rule of damages was the difference between the cost per ton of making and delivering the rails and the $58.

It was not improper to admit evidence which was unnecessary and which could not affect the merits of the case, or evidence from which it appears no prejudice resulted.

THIS was an action at law, brought in the Circuit Court of the United States for the Northern District of Illinois, by the Pittsburgh Bessemer Steel Company, (Limited,) a Pennsylvania corporation, against Francis E. Hinckley, to recover damages for the breach by Hinckley of a written contract for the purchase by him from the company of 6000 tons of steel rails. The contract was as follows:

"*Memorandum of Sale.*

"The Pittsburgh Bessemer Steel Company (Limited) have sold and hereby agree to make and deliver to the order of F. E. Hinckley, Esq., 204 Dearborn St., Chicago, Ills., and the said Hinckley has purchased and agrees to pay for, six thousand gross tons of first-quality steel rails, to weigh fifty-two (52) pounds to the yard, and to be rolled true and smooth to the pattern to be furnished by the said Pittsburgh Bessemer Steel Company, (Limited,) pattern No. 5.

"Said rails are to be made of the best quality of Bessemer steel, and to be subject to inspection as made and shipped, and to be well straightened and free from flaws, and to be drilled as may be directed; at least ninety per cent. shall be in thirty (30) feet lengths, with not over ten (10) per cent. of shorter lengths, diminishing by one foot differences, none to be less than twenty-four (24) feet.

"All second-quality rails or excess of shorts which may be made, not exceeding five (5) per cent. of each month's shipments, to be taken at the usual reduction of ten (10) per cent. in price, and to be piled and shipped separately, (painted white on both ends,) as may be ordered by the inspector.

"Deliveries to begin in May, 1882, in which month one

thousand tons shall be delivered, and to continue at the rate of twenty-five hundred tons per month after July 1, 1882, until finished, strikes and accidents beyond ordinary control of said steel company, and acts of Providence preventing or suspending deliveries, alone excepted, in which case deliveries are to be delayed for a corresponding length of time only.

"Price to be fifty-eight dollars net, per ton of 2240 pounds of finished steel rails, ex. ship or f. o. b. cars at Chicago, Ills., seller's option.

"Terms of payment, cash on delivery of inspector's certificate for each five hundred tons as fast as delivered. If shipment is delayed without fault of said steel company, payment is to be made in cash upon completion and delivery of each five hundred tons at Chicago and inspector's certificate. Rails to be inspected at mill as fast as completed and ready for shipment.

"In witness whereof, the said Hinckley has hereto set his hand and seal, and the Pittsburgh Bessemer Steel Company, (Limited,) by its duly authorized officers, hath signed and affixed its corporate seal, the day and year aforesaid.

"It is further agreed, that the Pittsburgh Bessemer Steel Company (Limited) are not to be responsible for delays resulting from failure of railroads to furnish cars, proper efforts having been made to procure them, nor for detentions after shipment has been made.

"It is understood that the purchaser shall have the right to make one-half of the order fifty-six (56) pounds per yard, pattern No. 4 of said steel company, notice to be given thirty days before the time for the delivery of the rails.

"Chicago, Ills., Feb. 18, 1882.

"F. E. Hinckley.

"C. H. Odell, *Broker.*"

One copy of the contract was signed by Hinckley, and a duplicate of it was signed by the company.

The defendant pleaded the general issue, and the case was tried by the court on the due waiver of a jury. The court made the following special finding of facts:

Statement of Facts.

"1. That the written agreement set out and described in the declaration was duly executed by the plaintiff and defendant in said cause, as alleged in said declaration.

"2. That immediately after the making of said contract, and before the time to begin the execution thereof, the plaintiff purchased the requisite amount of material from which to manufacture the six thousand tons of steel rails called for by said contract, and that, after the purchase of said supplies by plaintiff, there was a decline in the value thereof, before the time for the delivery of any portion of said rails, and that lower prices for such supplies ruled during the months of May, June, July, and August, 1882.

"3. That it appears from the parol proof heard on said trial, aside from the provision in said written contract in regard to drilling directions, that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof, and that each railroad company has its own special rules for drilling, and the drilling of such rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer in order to fully complete the rails for use.

"4. That, by letters dated April 3, April 20, April 26, and April 28, from plaintiff's agents to defendant, and which letters were duly received by defendant before May, 1882, defendant was requested to furnish drilling directions for the rails to be delivered in May under said contract, and defendant not only neglected to comply with such request and furnish such directions, but defendant also notified plaintiff, in reply to such request, that he, defendant, was not then prepared to receive the rails which were to be delivered under said contract in the month of May.

"Again, about the 15th of June, defendant informed plaintiff that he was becoming discouraged about being able to take the rails.

"That, about June 23, plaintiff notified defendant that it was ready to commence rolling the rails for the July deliveries, as well as to cover the thousand tons specified in the contract for delivery in May, of which plaintiff had postponed

delivery at defendant's request, and asked for drilling directions from the defendant, but defendant wholly neglected to give such drilling directions.

"That about the 26th of July, defendant, in substance informed plaintiff's agents, that his financial arrangements for money to pay for said rails, pursuant to said contract, had failed, and that he could not take said rails unless plaintiff would sell them to him on six and twelve months' credit, for which the notes of the railroad company for which defendant was acting would be given, which defendant would indorse, and also further secure with first-mortgage bonds, as collateral, at fifty cents on the dollar, but, unless he could secure the rails on such terms, he could not take them, and that plaintiff declined to accept said proposition for the purchase of said rails on credit; and I further find, that, on the 30th of August, 1882, plaintiff notified defendant that the time for the completion of his contract for the purchase of said rails had expired, and requested the defendant to advise it whether he would accept the rails or not. To this request defendant made no reply.

"I further find, that, while plaintiff did not expressly agree with defendant to postpone the time for the delivery of the rails to be made and delivered under said contract, yet plaintiff did in fact delay the rolling and delivery of the rails to be delivered in May, and that, by reason of the repeated statements of defendant that he was not ready to give drilling directions, not ready to use said rails, and not ready to accept them, plaintiff did postpone rolling said rails, and in fact never rolled any rails to be delivered on said contract, but that plaintiff was at all times during the months of May, July, and August ready and able, in all respects, to fulfil said contract and make said rails, and the same would have been ready for delivery, as called for by said contract, if defendant had furnished drilling directions, and had not stated to plaintiff's agents that he was not ready to furnish said drilling directions and not ready to accept said rails.

"I further find, that, on or about the 15th day of September, 1882, defendant was formally requested to furnish drill-

ing directions and to accept said rails, and that he replied to such request that he should decline to take any rails under said contract, and that he had made arrangements to purchase rails of others at a good deal lower price.

"I therefore find, from the testimony in this case, that defendant, by requesting plaintiff to postpone the delivery of said rails, and by notifying the plaintiff that he was not ready to accept and pay for said rails, excused the plaintiff from the actual manufacture of said rails and a tender thereof to defendant.

"And I further find, that defendant's statement to plaintiff, on the 26th of July, that he could not pay cash for said rails, as called for by the contract, and that he wished to buy them on credit, was in fact a notice that he would not be able to pay for said rails if rolled and tendered to him by plaintiff.

"I therefore conclude, and so find as a matter of fact, from the evidence in the case, that said plaintiff in apt time requested defendant to furnish directions for the drilling of said rails, and that defendant neglected and refused to do so, and that, although plaintiff was ready and able to fully perform said contract, and make and deliver said rails to defendant, as required by said contract, defendant refused to accept and pay for said rails.

"5. That plaintiff manufactured and sold to other persons 4000 tons of steel rails, from the materials so purchased with which to perform said contract with defendant, for which said rails plaintiff received $54.60 per ton, delivered at a port on Lake Huron, and that plaintiff made a profit of $1.60 per ton on said 4000 tons; that, by reason of defendant's refusal to accept said rails, the plaintiff had no employment for its mill for a time, and was obliged to stop its mill for about three weeks, in the month of August, 1882.

"6. That it would have cost plaintiff $50 per ton to have manufactured and delivered the rails called for by said contract to defendant, according to the terms of said contract; so that plaintiff's profits, if it had not been prevented from fulfilling said contract by the conduct of defendant, would have been $8.00 per ton on each ton of rails called for by said contract.

Argument for Plaintiff in Error.

"And, because of said facts, I find that defendant was guilty of a breach of said contract, and that plaintiff hath sustained damage, by reason of such breach, in the sum of $42,400."

On these findings, a judgment was entered for the plaintiff for $42,400 damages, and for costs. 17 Fed. Rep. 584. To review that judgment the defendant brought this writ of error. After the record was filed in this court, it being discovered that there was an error in computation in entering the judgment for $42,400, instead of $41,600, the Circuit Court allowed the plaintiff to remit the difference, $800, and an order was entered accordingly, as of the date of the judgment.

Mr. Thomas S. McClelland for plaintiff in error.

1. The giving of drilling directions, as an option reserved to the plaintiff in error, was not a condition precedent to a performance of the contract on the part of the defendant in error; and its failure to manufacture and deliver the goods provided for by the contract was a breach which barred it from maintaining this action. *Palm* v. *Ohio & Mississippi Railroad*, 18 Ill. 217; *Christian County* v. *Overholt*, 18 Ill. 223.

2. If there is a cause of action against plaintiff in error, the measure of damages should be the difference between the contract price and the market price at the time and place of delivery, and not the difference between the contract price and the cost of manufacturing and delivering the goods, as found by the lower court. *Pollen* v. *Le Roy*, 30 N. Y. 549; *Masterton* v. *Brooklyn*, 7 Hill, 61;[1] *Boorman* v. *Nash*, 9 B. & C. 145; *Story* v. *New York & Harlem Railroad*, 6 N. Y. 85; *Maclean* v. *Dunn*, 4 Bing. 722; *Leigh* v. *Paterson*, 8 Taunt. 540; *Gainsford* v. *Carroll*, 2 B. & C. 624. The contract was one and indivisible notwithstanding the goods were to have been delivered by instalments, and if any breach of the contract occurred, occasioned by the nonfeasance of Hinckley, it was when he failed to furnish drilling directions for the May delivery of 1000 tons, and the measure of damages should

[1] *S. C.* 42 Am. Dec. 38.

have been fixed at the difference between the market and contract prices in that month. *Masterton* v. *The Mayor, &c.*, 7 Hill, 71.[1] In an action by a vendee against a vendor, for a breach in not delivering the article sold, the measure of damages is the market price at the time of the breach. *Marsh* v. *McPherson*, 105 U. S. 709; *Hopkins* v. *Lee*, 6 Wheat. 109; *Douglass* v. *McAllister*, 3 Cranch, 298; *Shepherd* v. *Hampton*, 3 Wheat. 200; *Masterton* v. *Mayor*,[1] and cases cited. In an action against a vendee of real estate for a breach of contract to take and pay for land, the measure of damage is the difference between the contract price and the price for which the land could have been sold at the time of the breach. *Old Colony Railroad* v. *Evans*, 6 Gray, 25;[2] *Griswold* v. *Sabin*, 51 N. H. 167. The defendant in error was bound to exercise due diligence to protect itself, and thereby inflict the least possible damages on the plaintiff in error, even if the latter was guilty of a breach of his contract. It was the duty of the former to have manufactured the raw material, which it claimed to have purchased for the rails in question, into standard 52 and 56-pound rails, and tender them at Chicago, the place of delivery, and, if not accepted, to have them sold at the current market price, which seems to have been about $55 per ton, and by so doing reduce Hinckley's liability to $3 per ton at the most. *Shannon* v. *Comstock*, 21 Wend. 456;[3] *Heckscher* v. *McCrea*, 24 Wend. 304, and cases cited; *Hamilton* v. *McPherson*, 28 N. Y. 72,[4] and cases cited.

3. The finding and judgment in this case being $800 in excess of the actual amount due, on the theory and basis of computation adopted by the court below, the case should be reversed and remanded, for the reason that the judgment being an entirety, and not made up of distinct and separate items, cannot be affirmed in part and reversed in part, but should be wholly reversed, with directions, providing this court shall not find other error in the record.

4. Where a witness testifies regarding written entries in a book, or a writing, and he produces extracts of the same, such

[1] *S. C.* 42 Am. Dec. 38.
[2] *S. C.* 66 Am. Dec. 394.
[3] *S. C.* 34 Am. Dec. 262.
[4] *S. C.* 84 Am. Dec. 330.

extracts cannot be admitted in evidence, nor can the witness use the extracts for the purpose of refreshing his memory. *Doe* v. *Perkins*, 3 T. R. 749; *Merrill* v. *Ithaca & Oswego Railway*, 16 Wend. 586,[1] and cases cited. And this court will look into the record to ascertain if such error was committed. *Martinton* v. *Fairbanks*, 112 U. S. 670, and cases cited.

Mr. John N. Jewett for defendant in error.

Mr. Justice Blatchford, after stating the case as above reported, delivered the opinion of the court.

On the special findings, the only question open for review is, whether the facts found are sufficient to support the judgment. There can be no question, that, on those facts, the defendant is liable in damages for a breach of the contract. It is provided in the contract, that the rails are "to be drilled as may be directed." The Circuit Court finds that it appears from the proof, aside from the provision in the written contract in regard to drilling directions, "that it was usual and customary for the purchaser of steel rails to give directions as to the drilling thereof;" that each railroad has its own special rules for drilling; that the drilling of the rails is considered in the trade as a part of the work of manufacture, and a part of the duty of the manufacturer, in order to fully complete the rails for use; that, by four letters written in April, 1882, by the agents of the plaintiff to the defendant, and which letters were duly received by the defendant before May, 1882, he was requested to furnish drilling directions for the 1000 tons of rails to be delivered in May, under the contract; that he neglected to comply with that request, and also notified the plaintiff that he was not then prepared to receive the rails which, by the contract, were to be delivered in May; that, in June, the plaintiff again asked for drilling directions from the defendant, in respect both to the 1000 tons, and to the 2500 tons to be delivered in July, but the defendant neglected to give such drilling directions; and that, in the latter part of July, he notified the plaintiff, in substance, that he would not

[1] *S. C.* 30 Am. Dec. 130.

perform the contract. The Circuit Court further finds, that, by reason of the repeated statements of the defendant that he was not ready to give drilling directions, not ready to use the rails, and not ready to accept them, the plaintiff postponed the rolling of them, and never rolled any rails to be delivered on the contract, but was at all times during May, July and August, 1882, ready and able to fulfil the contract and make the rails, and the same would have been ready for delivery as called for by the contract, if the defendant had furnished drilling directions, and had not stated to the agents of the plaintiff that he was not ready to furnish the drilling directions, and not ready to accept the rails; and that, on or about the 15th of September, 1882, he was formally requested to furnish drilling directions and to accept the rails, and replied to such request that he should decline to take any rails under the contract, and had made arrangements to purchase rails of others at a lower price. The Circuit Court also finds, that the defendant, by requesting the plaintiff to postpone the delivery of the rails, and by notifying the plaintiff that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing them and tendering them to the defendant. This conclusion is entirely warranted by the facts found, and, on those facts, the defendant must be held liable in damages. The only other question open on the findings is as to the proper rule of damages.

The Circuit Court finds, that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms; that the profits of the plaintiff, if the conduct of the defendant had not prevented it from fulfilling the contract, would have been $8 per ton on each of the 6000 tons, being $48,000; and that the plaintiff manufactured and sold to other persons 4000 tons of rails from the materials purchased by it with which to perform the contract with the defendant, and received for such rails $54.60 per ton, and made a profit of $1.60 per ton on the 4000 tons, being a profit, in all, of $6400. Deducting this $6400 from the $48,000, leaves $41,600, for which amount the judgment was finally entered.

The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails, and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article, is not applicable to a case like the present. The proposition, that, after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff should still have gone on and made the 6000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice.

It is found by the Circuit Court, that, immediately after the making of the contract and before the time to begin its execution, the plaintiff purchased the requisite amount of material from which to manufacture the 6000 tons of rails; that, after the purchase of such supplies, there was a decline in their value before the time arrived for the delivery of any part of the rails; and that lower prices for such supplies ruled during May, June, July and August, 1882. It is also to be inferred, from the price at which the 4000 tons of rails were sold by the plaintiff, that the market price of rails declined below the price named in the contract; and the reason assigned by the defendant, in September, 1882, for not taking any rails under the contract, was, that he had made arrangements to purchase rails of others at a lower price. Under these circumstances, the defendant is estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that

the rule of damages adopted by the Circuit Court was the proper one. It was in accordance with the rule laid down by this court in *Philadelphia, Wilmington & Baltimore Railroad Co.* v. *Howard*, 13 How. 307. In that case a contractor for the building of a railroad sued the company for its breach. On the question of damages this court said, p. 344: "It must be admitted that actual damages were all that could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits,' in this instruction, as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam*. And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost. *See Masterton* v. *Mayor of Brooklyn*, 7 Hill, 61,[1] and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work, was a proper subject of damages."

In *United States* v. *Speed*, 8 Wall. 77, where the defendant agreed to pack a specified number of hogs for the plaintiff, and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, this

[1] *S. C.* 42 Am. Dec. 38.

court, citing with approval *Masterton* v. *Mayor of Brooklyn*,[1] held that the measure of damages was the difference between the cost of doing the work and the price agreed to be paid for it, "making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract."

These views were again approved by this court in *United States* v. *Behan*, 110 U. S. 338.

In the present case, the ability of the plaintiff to fulfil the contract at all times is found as a fact by the Circuit Court, as also the fact, that, by reason of the defendant's refusal to accept the rails, the plaintiff was obliged to stop its mill for about three weeks, in August, 1882. The defendant received the benefit of all the mitigation of damages which, upon the facts found, he was entitled to claim, and the benefit of all the profits made by the plaintiff which could properly be regarded as a substitute for the profits it would have received had its contract with the defendant been carried out.

The defendant objects that, within the statement of the rule in *United States* v. *Speed*, there was no deduction made in this case for the time saved, and the care, trouble, risk, and responsibility avoided by the plaintiff by not fully executing the contract; but there are no findings of fact which raise any such question. The finding is, that it would have cost the plaintiff $50 per ton to have manufactured and delivered the rails called for by the contract, according to its terms. Under this finding, it must be held that every proper element of cost entered into the $50; and it was for the defendant to have requested findings which would authorize an increase of that sum as cost.

There is a bill of exceptions in the case, on which two questions are raised by the defendant as to the admission of testimony. The contract between the parties was negotiated by C. H. Odell, who signed it as broker, between whom and the defendant the correspondence thereafter, down to and including the 1st of May, 1882, was carried on, Odell acting for the plaintiff. He made the contract under special instructions, his authority being limited to that of a sales agent. On his exam-

[1] *S. C.* 42 Am. Dec. 38.

ination as a witness at the trial, he testified that all of his communications with the plaintiff in regard to the business with the defendant were in writing or by telegram. He also testified, without objection, that he kept the plaintiff fully advised of his correspondence with the defendant concerning the rails. H. P. Smith, the business manager of the plaintiff, was then called as a witness for the plaintiff, and was asked if the plaintiff was advised of the correspondence between Odell and the defendant, which had been read in evidence, and if Odell's actions were approved by the witness as manager of the plaintiff. To this the defendant objected, on the ground that the communications between Odell and the plaintiff consisted of letters and telegrams, which were the only competent evidence of the contents thereof. The court overruled the objection, and the witness stated that the company was advised of the correspondence and actions of Odell, and fully approved and ratified the same. The defendant excepted to the decision admitting the evidence. We see no objection to the admission of this evidence, independently of the fact that Odell had, without objection, testified to substantially the same thing. The defendant, in his correspondence with Odell, all of which is set forth in the bill of exceptions, treated Odell as representing the plaintiff, and cannot now be heard to question his authority to do so, or to demand further evidence of such an authority, or of the adoption by the plaintiff of what Odell was doing, saying, and asking on behalf of the plaintiff. The question asked of Smith, as to whether he, as manager of the plaintiff, approved of Odell's actions, and the answer he made, were, therefore, unnecessary, and could not affect the merits of the case.

Smith was further asked to state in detail the elements of the cost of rolling the rails in question. He produced a memorandum showing items taken from the plaintiff's books, which, added together, exhibited the cost, in August, 1882, of manufacturing one ton of such rails as those described in the contract; and, on being asked by the plaintiff's attorney to testify to those items, the court, under the defendant's objection, allowed him to read the items from the memorandum.

He further testified, under an objection and exception by the defendant, that the actual cost to the plaintiff of making and delivering the rails in Chicago would have been $48.25; that he stated the elements of such cost from a memorandum prepared by himself, the elements being taken from the books of the plaintiff; that he knew the purchase price of all material which went into the manufacture, because he purchased all of it himself; that the statement was prepared by him from his personal knowledge of the cost; that he called off the items from a pencil memorandum to the bookkeeper, who wrote them down; that he (the witness) knew the items to be correctly stated; and that the information as to the items was made up from records running through a series of four or five months, and representing an average as to the cost per ton.

The defendant contends that this evidence was inadmissible, in the absence of an opportunity for him to examine the plaintiff's books, with a view to a cross-examination of the witness as to the mode of computation adopted by him, the memorandum being, as contended, the result of the conclusions of the witness from the examination of a large number of entries in the books of the plaintiff.

It is a sufficient answer to this objection, that the cost of the rails was not taken by the court at the sum of $48.25, the sum fixed by Smith, but the bill of exceptions shows that the cost was taken at $50 a ton, from the testimony of Richard C. Hannah, another witness; so that, even if the testimony was erroneously admitted, (which it is not necessary to decide,) the defendant suffered no prejudice from its admission.

The judgment of the Circuit Court is affirmed.

UNITED STATES *v.* LE BRIS.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Submitted April 7, 1887. — Decided April 18, 1887.

The reservation of the Red Lake and Pembina Indians, in Polk County, Minnesota, is Indian country, within the meaning of § 2139 Rev. Stat.

Ex parte Crow Dog, 109 U. S. 556, affirmed to the point that § 1 of the act of June 30, 1834, though repealed, may be referred to for the purpose of determining what is meant by the term "Indian country" when found in sections of the Revised Statutes which are reënactments of other sections of that act.

THE question, certified, and the answer, are stated in the opinion of the court.

Mr. Assistant Attorney General Maury for plaintiff.

No appearance for defendant.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an information against Baptiste Le Bris under § 2139 of the Revised Statutes, for introducing spirituous liquors, "from some place and territory outside of the Indian country, into the Indian country, to wit, into that part thereof lying and being in the county of Polk in said district, and being and known as the Red Lake and Pembina Indian Reservation." Le Bris demurred to the information, and the judges holding the Circuit Court have certified to us, that, upon the hearings of the issues of law thus presented, their opinions were opposed upon the following questions:

1. Is the reservation of the Red Lake and Pembina Indians in Polk County, Minnesota, Indian country, within the meaning of § 2139 of the Revised Statutes of the United States?

2. What is meant by Indian country in the heading of c. 4, tit. 28 of the Revised Statutes, and in the sections in that chapter which define crimes committed in Indian country?

3. Does § 5596 of the Revised Statutes repeal and abolish the definition of Indian country found in § 1 of the trade and intercourse act of June 30, 1834, 4 Stat. 729?

4. If it does, are all the provisions of c. 4, tit. 28, for punishment of crime in Indian country, nugatory?

5. If the provisions of c. 4, tit. 28 of the Revised Statutes are not rendered nugatory by § 5596, to what locality do they apply?

The important inquiry is, whether the Red Lake and Pembina Indian Reservation has been "Indian country" within the meaning of § 2139 since the Revised Statutes went into

effect. That section is a reënactment in part of § 20 of the act of June 30, 1834, c. 161, 4 Stat. 729, 732, as amended by the act of March 15, 1864, c. 33, 13 Stat. 29, and it was decided by this court in *United States* v. 43 *Gallons Whiskey*, 93 U. S. 188, and 108 U. S. 491, that this reservation was "Indian country" before the revision of the statutes. At that time § 1 of the act of June 30, 1834, *supra*, was in force, which defined the Indian country as follows:

"That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

This section was not reënacted in the Revised Statutes, though other parts of the statute were. Consequently the section was repealed by § 5596 of the revision, but still we held in *Ex parte Crow Dog*, 109 U. S. 556, 561, that it might be referred to for the purpose of determining what was meant by the term "Indian country," when found in sections of the Revised Statutes which were reënactments of other sections of this statute. That decision was made since this case was heard below, and upon its authority we answer the first question certified in the affirmative. The repeal of this section does not of itself change the meaning of the term it defines when found elsewhere in the original connection. The reënacted sections are to be given the same meaning they had in the original statute unless a contrary intention is plainly manifested.

As the answer to the first question in the affirmative necessarily covers all that is material in the others, they need not be further referred to, and it is consequently ordered that it be certified to the court below that the first question is answered in the affirmative and that a further answer to the others is deemed unnecessary.

First question answered in the affirmative; other questions not answered.

PARKINSON *v.* UNITED STATES.

CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEVADA.

Submitted April 15, 1887. — Decided April 18, 1887.

Offenders against the provisions of §§ 5511 and 5512 Rev. Stat. must be prosecuted by indictment and not by information, as the nature of the punishment makes the crime "infamous" within the meaning of the Fifth Amendment to the Constitution of the United States.

THE case is stated in the opinion of the court.

No appearance for plaintiff.

Mr. Assistant Attorney General Maury for defendant.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here on a certificate by the judges of the Circuit Court of the United States for the District of Nevada, that they were opposed in opinion on certain questions which arose at the hearing of a writ of error for the review of the rulings of the District Court of the district at the trial of Richard R. Parkinson, on an information by the district attorney, for unlawfully, fraudulently, and feloniously voting at an election for a representative in Congress from Nevada, and for unlawfully, fraudulently, and feloniously registering his name as an elector qualified to vote at such election. The prosecution was under §§ 5511 and 5512 of the Revised Statutes, which made the offences charged punishable by a fine of not more than five hundred dollars, or by imprisonment not more than three years, or both. As the imprisonment may be "for a period longer than one year," the court can order that it shall be in the penitentiary. Rev. Stat. § 5541. This makes the crime "infamous," within the meaning of the Fifth Amendment of the Constitution of the United States, and the prosecution should have been by indictment and not by infor-

mation. It was so decided by this court, after this case was certified up by the Circuit Court, in *Ex parte Wilson*, 114 U. S. 417, and *Mackin* v. *United States*, 117 U. S. 348. As the judgment of the District Court must be reversed for this cause, the questions certified have become immaterial, and their determination unnecessary in the final disposition of the case. We, therefore, remand the case without answering them. *Reversed.*

CHURCH *v.* KELSEY.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Submitted March 28, 1887. — Decided April 18, 1887.

The Constitution of the United States does not prevent a state from giving to its courts of equity power to hear and determine a suit brought by the holder of an equitable interest in land to establish his rights against the holder of the legal title.

A state constitution is not a contract within the meaning of that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligation of contracts

This was a motion to dismiss, to which was united a motion to affirm. The case is stated in the opinion of the court.

Mr. Chapin Brown for the motions.

Mr. A. Ricketts opposing.

Mr. Chief Justice Waite delivered the opinion of the court.

If we understand correctly the questions on which, it is claimed, our jurisdiction in this case rests, they are: 1. That the provision in § 1, Art. XIV of the Amendments to the Constitution of the United States, that a state shall not "deprive any person of life, liberty, or property without due process of law," prevents the State of Pennsylvania from giving jurisdiction to a court of equity of a suit brought by the

owner of an equitable interest in land to establish his rights against the holder of the legal title, because it deprives the holder of the legal title of the right to a trial by jury which he would have in a suit at law; and, 2. That, as the constitution of a state is the "fundamental contract made between the collective body of citizens of the state and each individual citizen," a state statute which violates a state constitution is a "law impairing the obligation of contracts" within the meaning of that term as used in Art. I, § 10, clause 1, of the Constitution of the United States.

It sufficiently appears from the record that the first of these questions was actually presented to and decided by the court below adversely to the claim of the plaintiffs in error. That is sufficient to give us jurisdiction; but the decision was so clearly right that it is unnecessary to keep the case here for further argument. Certainly the provision of the Constitution referred to cannot have the effect of taking away from the states the power of giving a court of equity jurisdiction in cases requiring equitable relief. It may be true that in Pennsylvania "equity powers have been doled out to the courts by the legislature with a sparing hand," but there is nothing in the Constitution of the United States which requires that this should always be so. The suit of which complaint is made in this case was brought to establish a trust in the holder of the legal title, which from time immemorial has been a proper subject of chancery jurisdiction. It is useless to contend that the Constitution of the United States prevents any state from giving a court of equity the power to hear and determine such a case. This has not been doubted in the courts of Pennsylvania, as we understand. *North Penn. Coal Co.* v. *Snowden*, 42 Penn. St. 488, 492.[1]

We cannot find that the other question was actually presented to the state court for decision. Certainly it cannot be found in the record in the form it has been stated in the brief of counsel here. But if it had been, no argument would be needed to show that the objection was not well taken. A state constitution is not a contract within the meaning of that

[1] *S. C.* 82 Am. Dec. 530.

Counsel for Parties.

clause of the Constitution of the United States which prohibits the states from passing laws impairing the obligation of contracts. It is the fundamental law adopted by the people for their government in a State of the United States, and as such it may be construed and carried into effect by the courts of the State, without review by this court, except in cases where what is done comes, or is supposed to come, in conflict with the Constitution of the United States. Such is not the claim here, the only question under this branch of the case being whether the statute giving jurisdiction to the court of equity in the suit under which the defendants in error claim title is in violation of the constitution of the state.

The motion to dismiss is overruled, and that to affirm granted.

LOUISIANA BANK *v.* WHITNEY.

BOARD OF LIQUIDATION OF NEW ORLEANS *v.* SAME.

ERROR TO AND APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Submitted April 11, 1887. — Decided April 18, 1887.

An order of court directing the payment into the registry of the court of a garnishee fund, claimed by a third party, pending the determination of the right to it, is not a final judgment or decree within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error.

THIS was a motion to dismiss for want of jurisdiction. The case is stated in the opinion of the court.

Mr. Thomas J. Semmes and *Mr. Alfred Goldthwaite* for the motion.

Mr. Henry C. Miller opposing.

Opinion of the Court.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a proceeding begun May 22, 1883, by Mrs. Myra Clark Gaines, then in life, to subject a certain sum of $40,000 on deposit in the Louisiana National Bank to the payment of a judgment in her favor against the City of New Orleans. There is no dispute about the fact that the money in question was on deposit when the proceeding was begun and the bank served with process, but the Board of Liquidation of the City Debt has made claim to it as part of the fund appropriated by Act No. 133 of 1880 to the payment and liquidation of the bonded debt of the city. Pending the determination of the questions involved, the court, March 15, 1886, ordered the money paid into the registry of the court. From this order the bank has appealed, and also sued out a writ of error, and the Board of Liquidation has likewise appealed. The representatives of Mrs. Gaines, who were made parties to the proceeding after her death, now move to dismiss both the writ of error and the appeals, because the order to be brought under review is not a final judgment or decree within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error.

We have no hesitation in granting the motion. The court has not adjudicated the rights of the parties concerned. It has only ordered the fund into the registry of the court for preservation during the pendency of the litigation as to its ownership. Such an order it has always been held is interlocutory only and not a final decree. *Forgay* v. *Conrad*, 6 How. 204; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 431. If in the end it shall be found that the fund belongs to the Board of Liquidation, it can be paid from the registry accordingly, notwithstanding the order that has been made. The money when paid into the registry will be in the hands of the court for the benefit of whomsoever it shall in the end be found to belong to.

Both the appeals and the writ of error are dismissed.

Syllabus.

DUGGER *v.* TAYLOE.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

Submitted April 7, and April 11, 1887. — Decided April 18, 1887.

No assignments of error being made in these cases, and there being no appearance for plaintiffs in error, the Court affirms the judgments below under Rule 21, § 4, 108 U. S. 585, for want of due prosecution of the writs of error.

THE case is stated in the opinion of the court.

No appearance for plaintiffs in error.

Mr. James T. Jones for defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

These are writs of error brought for the review of judgments of the Supreme Court of Alabama. No assignment of errors was returned with the writ in either of the cases, as required by § 997 of the Revised Statutes. No counsel has appeared for the plaintiffs in error, but the cases have both been submitted by the defendants in error on briefs, without any specification of errors by the plaintiffs, as required by Rule 21, § 2, 108 U. S. 585. We, therefore, affirm the judgment in each case, under § 4 of the same rule, 108 U. S. 585, for want of a due prosecution of the writ of error.

Affirmed.

THATCHER HEATING COMPANY *v.* BURTIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued April 5, 1887. — Decided April 18, 1887.

A combination of well-known separate elements, each of which, when combined, operates separately and in its old way, and in which no result is produced which cannot be assigned to the independent action of one or the other of the separate elements, is not patentable.

Opinion of the Court.

Letters-patent No. 104,376, dated June 14, 1870, granted to John M. Thatcher for improvements in fireplace heaters, are not for a particular device for effecting the combination described in the patentees' claim, but for the combination itself, no matter how or by what means it may be effected, and, as such, are void.

BILL in equity to restrain infringements of letters-patent. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion of the court.

Mr. B. F. Lee for appellants.

Mr. A. J. Todd for appellees.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

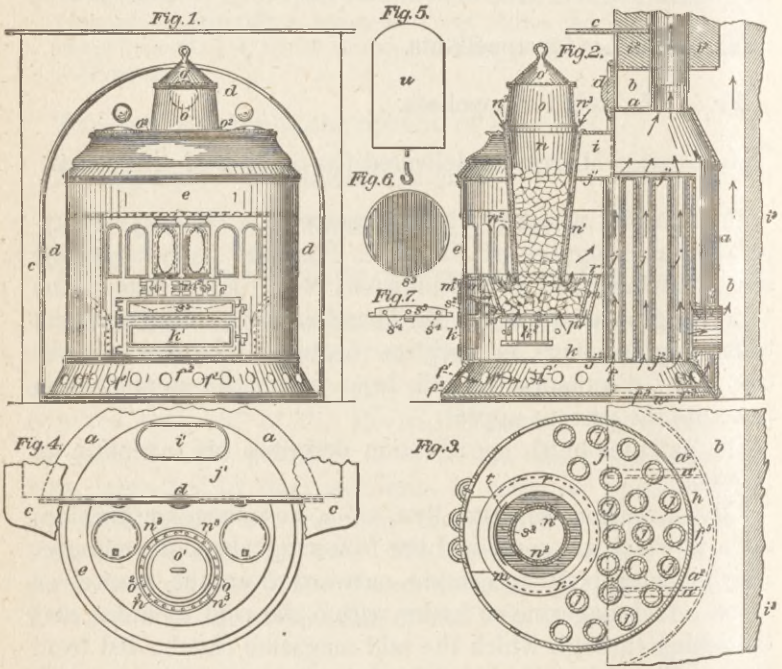
This is a bill in equity filed December 13, 1875, by the appellants, as assignees of John M. Thatcher, to restrain the alleged infringement of letters-patent No. 104,376, dated June 14, 1870, granted to John M. Thatcher for certain new and useful improvements in fireplace heaters. There was a decree below dismissing the bill, from which the complainants prosecute the present appeal.

The patentee in his specification describes his invention as follows:

"My invention consists, first, of a base-burning fireplace stove, in which are combined the following elements, namely: A cylinder or body projecting outward from the mantel or frame, a fuel magazine or feeder within the said cylinder, and an opening through which the said magazine can be fed from above. The object of this part of my invention is to increase the capacity of the fuel magazine; secondly, of a base-burning fireplace stove or heater in which the magazine or feeder is extended to the feed-opening of the outer casing, so that there may be no open space across which to project the fuel on feeding the magazine; thirdly, in the combination, with a fireplace stove or heater, of a feeder or magazine projecting above the top of the heater, so as to increase the capacity of the said magazine.

"Figure 1 is a front view of my improved fireplace heater;

Fig. 2, a vertical section of the same; Fig. 3, a sectional plan; Fig. 4, a plan view with part of the mantel removed; Fig. 5, a view of the "slicer" or plate to be introduced into the fire-pot under the "feeder," for the purpose of holding up the coal which is unconsumed when the clinkers, ashes, &c., in the lower part of the fireplace have to be removed; Fig. 6 is a plan view of the grate, and Fig. 7 an edge view of the grate."



The specification then proceeds to describe in detail the various parts and arrangements of the heater, but as that portion is not material to a determination of the questions arising in the case it is omitted. The specification then proceeds as follows:

"A more minute description of my improved heater than that given above will be unnecessary, as several of the parts described and illustrated in the drawings form the subjects of other patents, and my present improvements relate especially

to the top-feeding arrangements of a fireplace stove or heater. I will now refer more particularly to these improvements.

"In constructing my improved heater I have so combined three elements or features as to produce an important result. These features are as follows: First, a cylinder or body of the heater projecting outward from the frame or mantel; second, a feeder or fuel-magazine within the cylinder; and, thirdly, an opening through which the said magazine can be fed from above.

"While fireplace stoves or heaters with protuberant cylinders and feeders or magazines were known prior to the date of my invention, I am not aware that the above combination of three features above referred to — namely, a top-feeding arrangement, a protuberant cylinder permitting such an arrangement, and a magazine within the cylinder — has ever been known or used prior to my invention of the same.

"It has been the practice to so construct base-burning fireplace stoves or heaters that the fuel had to be introduced into the feeder or magazine through a doorway in front; hence the magazine was of a very limited capacity. By so arranging the feed-hole, however, that the fuel can be introduced into the magazine from above, the capacity of the magazine is increased — a result which I especially aimed at in adopting the first part of my invention, namely, the above-mentioned combination, and in the production of my top-feeding, base-burning fireplace stove.

"The second part of my invention consists in extending the feeder or magazine to the feed-hole of fireplace stoves. This not only increases the capacity of the magazine to some extent, but an uninterrupted passage or guide is afforded for the introduction of fuel into the magazine through the opening in the outer casing.

"The capacity of the magazine is still further increased, in the present instance, by carrying the feeder up above the top of the heater, by placing thereon a movable section, *o*, furnished with a cover, *o'*, which has to be lifted off when coal has to be introduced into the magazine."

The first and second claims, which are alone involved in this controversy, are as follows:

"1. A base-burning, fireplace stove, in which are combined the following elements, namely, a cylinder or body projecting outward from the mantel or frame, a fuel magazine or feeder within the cylinder, and an opening through which the said magazine can be fed from above.

"2. A fireplace stove or heater, in which the magazine is extended to the feed-opening of the outer casing."

The case turned in the Circuit Court on the question of the validity of the patent on the ground of want of novelty in the invention in view of the state of the art at its date. In passing upon this question on final hearing, Judge Wallace, in his opinion, stated the grounds of his decree dismissing the bill, as follows:

"It is conceded that these claims are to be construed broadly, so as to cover the combination of a fireplace heater having a body projecting outwards from the mantel or frame, and a furnace-like portion in the chimney behind the mantel, with a fuel receptacle within the cylinder of the heater, which will preserve a supply of unignited coal while the heater is in operation, and an opening through which the magazine can be fed from above, the magazine extending to this opening. Inasmuch as the heater was old, and the fuel receptacle with the described opening was old when located within an ordinary coal stove, what Thatcher accomplished was merely the advantageous location of the fuel receptacle within the fireplace heater. As the complainants' expert, Mr. Brevoort states: 'The problem Thatcher had before him was to place the fuel magazine within the Bibb & Augee heater.'

"It must be conceded that it was not obvious that such a fuel magazine could be advantageously employed in such a heater. Attempts had been made by others to do the same thing without satisfactory results, but Thatcher's organization was a success, and immediately commended itself to the public. But Thatcher's broad claims cannot be sustained. There may have been patentable novelty in the means he employed to adjust the parts in the new organization, but there was none in merely bringing those parts together. They did not perform any new function in the new arrangement. The fuel magazine

does just the same work in the new structure it did in the ordinary coal stove. All the other parts of the fireplace heater operate precisely as they would if the ordinary fuel pot were used instead of the substituted magazine. The parts do not coöperate to produce a new result. By their aggregation the new structure contains all the advantages which resided before separately in several structures. The new heater is, therefore, a better heater than any which preceded it, but it does not present a patentable combination, irrespective of the means employed to adjust the several parts into efficient relations to each other.

"As, concededly, the claims of the patent are not to be limited to any such combination, they must be held void for want of patentable novelty." 12 Fed. Rep. 569.

On this appeal, counsel for the appellants contest the accuracy of the positions of the Circuit Court on which its decree is founded, and in opposition thereto contend: First. That it was sufficient to support the patent that Thatcher found out that the fuel magazine was useful in its new situation, and that its use in this new situation was not obvious to those skilled in the art; in other words, that Thatcher, having succeeded in making a better fireplace heater than any that had gone before it, by doing something that was not obvious to those skilled in the art, what he did involved invention as distinguished from mere mechanical skill. Second. That as regards fireplace heaters, the fuel magazine did perform a new function, because its use was never before known in such structures. Third. That the parts of the combination stated in the claims did not constitute a mere aggregation, but coöperated to produce a new result. This new result, it is claimed, consisted in securing in fireplace heaters a uniform and steady heat that could be regulated for their own purposes by the occupants of the upper rooms heated by means of furnace registers, at the same time furnishing heat for the room in which it was situated by means of a heater that did not require frequent attention. The result of the contention on these points as claimed is, that the fireplace heater of the patent, containing a magazine extending to the outer casing of

the heater, capable of holding a supply of unignited coal and feeding the same to the fire, was patentable as a new article of manufacture.

Mr. Brevoort, the principal expert on behalf of the appellants, states the case on their part in his testimony as follows:

"The problem which Thatcher had before him was to place the magazine of his patent within the Bibb & Augee fireplace heater, or rather, his invention may be said to have consisted in the conception of the idea of taking out the fuel chamber or pot of the Bibb & Augee device, and substituting therefor a magazine of the kind shown in the Thatcher patent, the execution of which conception, if successful, had for its object to confer upon the fireplace heater the regularity and steadiness of action which alone could be secured by the use of a magazine standing ready always to automatically feed the fire whenever it may become necessary. Now, it was not at all an obvious thing that this large mass of unignited coal could be put within the comparatively limited compass necessary for the ordinary fireplace heater in place of the incandescent coal contained in the pot or fuel chamber of the Bibb & Augee heater, and still leave a heater which would be successful. Indeed, one of the defendants' witnesses in this case placed a magazine in a fireplace heater, tried it, and abandoned it as useless and as a positive injury, rather than, as future experiments have shown, a great benefit to the structure. Another witness seems to have introduced a magazine into one of his fireplace heaters at about the date of Thatcher's patent. This witness says that he did not think it was important, but says that had he known anything of its importance he would have got a patent for it. These two witnesses clearly show that the putting of a magazine into a fireplace heater was not obviously a good method of improving the old Bibb & Augee heater, and that even after a magazine had been introduced that its utility was not manifest without experiment and careful trial, and this testimony is given by men who apparently were thoroughly skilled in the art and had had much and long experience in the fireplace heater business. A consideration of the old Nott structure, if it ever existed, as testified to,

would have deterred rather than encouraged any one from introducing such a fuel receptacle as was there shown into a fireplace heater which was required to heat rooms above and below simultaneously. For the reasons above given I think that it required invention to introduce a magazine extending to the top or outer casing of the stove into a fireplace heater having a protuberant front for heating the room in which the heater stood and a furnace-like back for heating the air for the rooms above. Most assuredly, the parts referred to in the first and second claims of the Thatcher patent coact when in action in the production of the result desired. The protuberant body heats the lower room. The mantel or frame separates one portion of the heater from the other, so that the protuberant body may perform its function while the furnace-like back may perform its function. The fuel magazine holds the fuel in readiness to supply the fire which is to heat both back and front alike with steadiness and uniformity, the magazine being fed through a hole in the outer casing directly, thus obviating the opening of any doors into the combustion chamber when the fire is to be fed and the consequent cooling off of the heater by admitting fresh air into the device above the grate. By the bringing together of these parts and their joint action one with the other a fireplace heater is formed having advantages over any heater that went before, and which form of heater has gone so extensively and largely into use that it has practically superseded all other forms, as I am informed."

This statement must be considered in connection with the well-established and admitted facts in respect to the prior use of fuel magazines in base-burning out-standing stoves, so classified as stoves standing detached in the room to be heated, to distinguish them from fireplace stoves or heaters which are partially enclosed by the chimney-piece. Thatcher makes no claim in his patent for the fuel magazine, as long prior to the date of his application such a magazine was in common use in what are known as base-burning stoves. In construction and in position, with relation both to the burning mass in the pit of the stove and to the outer casing through which it opened,

either on the top or at the side of the stove itself, the fuel magazine of the out-standing stove is the same as the fuel magazine when placed in the fireplace heater according to Thatcher's patent. It is admitted that what Thatcher did, and all that he did, was to transfer this well known fuel magazine from its use in an out-standing base-burning stove to a fireplace heater, equally well known and in common use as to its arrangement, construction, position, and mode of operation. When this fuel magazine was thus transferred from one kind of stove to another, in its new situation it performed precisely the same function, with respect to the fuel and the fire, as it had always been accustomed to perform in its old place, and the fireplace heater into which it was thus newly placed, so far as the generation and transmission of heat and heated air are concerned, operated precisely as it had habitually done before.

It is true that such a fireplace heater, by reason of the fuel magazine, was a better heater than before, just as the out-standing stove with its similar fuel magazine was a better heater than a similar stove without such a fuel magazine. But the improvement in the fireplace heater was the result merely of the single change produced by the introduction of the fuel magazine, but one element in the combination. The new and improved result in the utility of a fireplace heater cannot be said to be due to anything in the combination of the elements which compose it, in any other sense than that it arises from bringing together old and well known separate elements, which, when thus brought together, operate separately, each in its own old way. There is no specific quality of the result which cannot be definitely assigned to the independent action of a single element. There is, therefore, no patentable novelty in the aggregation of the several elements, considered in itself.

If, however, to adapt these separate elements to each other, so that they can act together in one organization, required the use of means not within the range of mere mechanical skill, then it would be true that the invention of such means for effecting a mutual arrangement of the parts would be patent-

able. If, in the present case, owing to the necessary form, size, structure, and situation of a fireplace heater as ordinarily made and used, there were ascertained difficulties in uniting such a fuel magazine as Thatcher adopted from its known use in out-standing base-burning stoves, and those difficulties were overcome by something more than mere mechanical ingenuity, he might have been entitled to a patent, not for the combination, however made, of the fuel magazine and the fireplace heater, but for the means which he had invented for effecting it. Nothing of that, however, appears in this case. The invention described is not of any such device for effecting the combination; no claim is made of that character. The claim made is for the combination, no matter how or by what means it is or may be effected.

In this view of the case, it is impossible to distinguish it, so far as the rule of decision is concerned, from the cases of *Hailes* v. *Van Wormer*, 20 Wall. 353; *Heald* v. *Rice*, 104 U. S. 737, 754; *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490; *Morris* v. *McMillin*, 112 U. S. 244; *Hollister* v. *Benedict Manufacturing Co.*, 113 U. S. 59; *Thompson* v. *Boisselier*, 114 U. S. 1; *Beecher Manufacturing Co.* v. *Atwater Manufacturing Co.*, 114 U. S. 523; *Gardner* v. *Herz*, 118 U. S. 180.

There is no escape, we think, from the conclusions reached by the Circuit Court. Its decree is, therefore,

Affirmed.

MINNEAPOLIS ASSOCIATION *v.* CANFIELD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

Argued March 30, 31, 1887. — Decided April 18, 1887.

In November, 1872, K. was the owner of all the capital stock and in possession of all the real estate (using it as his own) of an agricultural association, incorporated under the laws of Minnesota. Two hundred shares of this stock he had purchased from G., giving notes therefor, secured

Counsel for Parties.

by pledge of the stock, which notes and stock were transferred to a state bank by G. to secure payment of a loan to himself. One hundred shares of the stock were purchased by K. of M., who in like manner transferred them to the state bank as collateral. K. transferred the remaining shares to B. as collateral for his obligation to B., with authority also to hold them as additional security for K.'s note, held by the bank. In August, 1873, K. contracted in writing to sell a large part of the real estate to C, the purchase money to be paid in railroad bonds, and verbally agreed to transfer all the capital stock, and procure a deed of the real estate from the corporation. C. had no knowledge of the transaction with the bank and with B. It was then agreed between K., B., and the bank, that the bank should take part of the railroad bonds in exchange for the stock held by it, the stock to be sent to the Park Bank in New York for exchange, and K. gave an order on C. for the bonds. In pursuance of the agreement K. procured a deed of the real estate to be executed by individual directors in the name of the corporation, which deed was never authorized by the directors at a meeting of the board, and delivered it to B. together with a warranty deed thereof in his own name. The order for the bonds was never presented to C., nor were the bonds deposited at the bank in New York, nor was the stock delivered to C.; but K. retained the bonds and C.'s notes for his own use. C. took possession of the real estate and conveyed a part of it to a harvester company. The association and the state bank filed a bill in a state court in Minnesota against C., to have the respective rights of the parties in the property determined. The Supreme Court of that state held on appeal that the deed to C conveyed no title to him; but that, subject to the rights of the bank and of B., C. was the equitable holder of the stock. Proceedings then took place at the motion of the state bank, which resulted in a pretended sale of the stock to various parties, whereupon C., who had filed his bill in the Circuit Court of the United States against the agricultural association and the state bank, filed a supplemental bill, including the purchasers of the stock, the general purpose of both bills being to establish his equities in the capital stock and corporate property of the association. *Held* (1), That it was not now open to him to set up that the deed of the directors was valid as the deed of the corporation, and that he acquired title through it and through K.'s deed, those being *res judicatæ;* (2) that the equities of the state bank in the stock were superior to those of C.; (3) that the pretended sale of the stock by the bank was not a real transaction; (4) that subject to some modifications the decree below should be affirmed.

In equity. The case is stated in the opinion of the court.

Mr. Eugene M. Wilson for appellants.

Mr. George F. Edmunds and *Mr. Charles E. Flandrau* (*Mr. E. C. Palmer* was also on the brief) for appellee.

Opinion of the Court.

MR. JUSTICE MATTHEWS delivered the opinion of the court.

The original bill in this case was filed August 14, 1877, by Thomas H. Canfield, a citizen of the state of Vermont, against the Minneapolis Agricultural and Mechanical Association, a corporation created under the laws of the state of Minnesota, and the State National Bank of Minneapolis, a corporation organized under the laws of the United States, at Minneapolis, in the state of Minnesota. Its general purpose was to establish the equities of the complainant in the capital stock and corporate property of the Minneapolis Agricultural and Mechanical Association as against the claims of the State National Bank.

Prior to the filing of this bill, in October, 1873, an equitable action was commenced by the State National Bank and Rufus J. Baldwin, its cashier, in the District Court of the Fourth Judicial District for the county of Hennepin and state of Minnesota, against Canfield, involving, to a certain extent, the matters here in controversy. The proceedings and judgment in that case are relied upon as *res judicata* in the present litigation, and are conclusive so far as the same matters are drawn in question in both suits.

The facts found by the District Court in Minnesota, in the proceeding referred to, are substantially as follows:

That the Minneapolis Agricultural and Mechanical Association in 1871 became a body corporate under the general laws of the state of Minnesota, for the purpose of promoting the agricultural and mechanical arts by holding fairs and other public exhibitions, with a capital stock of $40,000, divided into 800 shares of $50 each, all of which was paid up, and for which certificates were issued; that the government of said association was vested in a board of directors of eleven persons, to be elected annually by the stockholders, and continue in office for one year, and until their successors were elected and qualified; that said corporation became the owner in fee of certain described lands in the county of Hennepin, containing seventy acres, known as the Fair Grounds, on which it erected buildings and structures for the purpose of

accommodating the fairs which it proposed to hold, and for the other uses and purposes contemplated by their erection.

That on the 12th day of November, 1872, William S. King had become the owner of all the capital stock of the association, and was in possession of its real estate, using the same as his own individual property, without interference on the part of the corporation or its officers, the ordinary and lawful business of the corporation having been wholly suspended and abandoned; that 200 shares of the stock King had purchased from George A. Brackett on credit, giving his notes for the purchase money, secured by a pledge of the stock itself, which notes and stock, thus pledged, Brackett, on April 8, 1873, transferred and delivered to the State National Bank of Minneapolis to secure the payment of a loan of $10,000 made by the bank to Brackett; that 100 shares of said stock King had purchased from one Richard J. Mendenhall on credit, giving his promissory notes for the payment of the purchase money, secured by a pledge of the stock, which notes Mendenhall procured to be discounted for his benefit by the State National Bank, transferring to the bank the stock so pledged as collateral security.

That on July 19, 1873, King delivered to Rufus J. Baldwin the remaining 500 shares of stock as collateral security for his obligation to return to Baldwin certain gas stock of the value of $10,000 borrowed by King from him, and authorized Baldwin also to hold the said stock as additional security for King's notes held by the bank.

That on August 14, 1873, King agreed in writing to sell to Thomas H. Canfield, the complainant, the property known as the "Fair Grounds," in Minneapolis, excepting five acres subscribed to the stock of the Minneapolis Harvester Company, for the sum of $65,000, payable in 7-30 gold bonds of the Northern Pacific Railroad Company at the rate of ninety cents on the dollar, and the remainder in notes of Canfield, payable in equal instalments of one, two, and three years from date, with interest at the rate of ten per cent. per annum, King agreeing to procure abstracts of title, complete and perfect the same, and execute a warranty deed at as early

a day as possible; and it was then and there verbally agreed between King and Canfield that King would transfer all the capital stock of the Minneapolis Agricultural and Mechanical Association to Canfield, and also procure a deed of said property from said corporation to Canfield; that Canfield at the time of executing said agreement knew that the legal title to the property was in the corporation, but had no knowledge that the State National Bank of Minneapolis, or Baldwin, or any one else except King, had any interest in or claim to its capital stock.

That King informed Baldwin of his agreement to sell the fair grounds property to Canfield, and its terms, and it was thereupon agreed between King and Baldwin, acting for himself and the bank, that the bank should take $36,000 par value of said Northern Pacific Railroad bonds to be paid to King by Canfield in exchange for the 800 shares of stock of the Minneapolis Agricultural and Mechanical Association held by the bank, the said stock to be sent to the National Park Bank in the city of New York, to be delivered to Canfield upon his delivering at said bank to the order of Baldwin the Northern Pacific Railroad bonds to the amount of $36,000 par value, in exchange therefor.

That in pursuance of said agreement, King executed and delivered to Baldwin an order in writing on Canfield for the delivery of said bonds, which was indorsed by Baldwin, directing the delivery to the National Park Bank, and, on August 22, 1873, Baldwin sent the certificates for 800 shares of the stock, together with these orders, to the National Park Bank, with instructions to deliver the stock to Canfield on receipt of the bonds in exchange therefor.

That after the execution of the agreement of August 14, 1873, between King and Canfield, King, in pursuance thereof and for the purpose of carrying out the same, caused a deed to be executed, in the name of the Minneapolis Agricultural and Mechanical Association, for the fair grounds property, by R. J. Mendenhall, Thomas Lowry, W. D. Washburn, C. G. Goodrich, George F. Stevens, William S. King, Levi Butler, W. W. Eastman, W. F. Westfall, Dorilus Morrison, and

George A. Brackett, who were all the directors of said association, but the execution of this deed was never authorized at or by any meeting of said directors, nor was any resolution ever passed by the said board of directors in reference to the execution of the same, or authorizing the seal of the corporation to be attached thereto, or authorizing the sale or conveyance of said property in any way to said Canfield, the said deed having been executed by said parties separately and at different places, wherever said parties happened to be, at the request of said King or his attorney, for the purpose of enabling King to convey the property to Canfield. It was executed by Stevens at Utica, in the state of New York, by Morrison and Brackett in the city of New York, and by the other signers thereof in Hennepin County, Minnesota.

That said Brackett and said Morrison, at the time of signing said deed, having objected thereto on the ground that the stock was held by the State National Bank of Minneapolis, were informed of the agreement between King and Baldwin, whereby the said stock was to be delivered in exchange for Northern Pacific Railroad bonds, and thereupon executed the said deed.

That, at the time of the execution thereof by Brackett and Morrison, Canfield was informed by King that the stock of the association had been left as collateral to secure certain notes at the State National Bank of Minneapolis, and had been sent to the National Park Bank to be taken up by King with Northern Pacific Railroad bonds to be received by him from Canfield under said agreement.

That on September 12, 1873, in the city of New York, King delivered to Canfield the said deed, together with a warranty deed of the same property, duly executed and acknowledged by King, conveying the property in his own name; when and where Canfield delivered to King the said $65,000 in bonds of the Northern Pacific Railroad Company, and executed and delivered to him his notes for $6500 as required by the terms of the agreement of August 14, 1873, which deeds were, on October 4, 1873, duly recorded in Hennepin County.

That the orders in writing for the delivery of the bonds to

the National Park Bank were never presented to Canfield, nor were any of the said bonds deposited at the National Park Bank, nor was the stock of the association or any part of it ever delivered to Canfield, but was held by the bank as collateral security for the payment of the notes and the return of the gas stock, as hereinbefore stated.

That King retained for his own use the railroad bonds and Canfield's notes received under the agreement of August 14, 1873, and that Canfield through inadvertency did not demand the delivery of the stock of the association from King at the time of the delivery of said deed by King to him and the transfer of the bonds and notes by him to King, he, Canfield, supposing that the deeds delivered to him conveyed a complete title to the property.

That the Minneapolis Agricultural and Mechanical Association had no corporate property except the said Fair Grounds, and that shortly after receiving said deeds from King, Canfield conveyed to the Minneapolis Harvester Works Company the five acres excepted out of the said property by the terms of the agreement of August 14, 1873, which said five acres had been, previously to the execution of said agreement, subscribed to the stock of said company; and that shortly after receiving his deeds, Canfield took possession of the grounds and of the buildings remaining thereon, and remained in possession thereof at the time of the decree in said suit.

Upon these facts it was adjudged by the District Court of Minnesota that Canfield, by virtue of the deeds referred to, acquired no title to said real estate; that the State National Bank of Minneapolis was the *bona fide* holder of the whole amount of the capital stock as collateral security for the debts due to it, and by reason thereof had a right to have the property of the corporation applied to its redemption, which right was prior and superior to any claim to or interest in said stock or real estate on the part of Canfield; but that Canfield, subject to the right and interest therein of the said bank, was the owner in equity of the said stock. Neither King nor the Minneapolis Agricultural and Mechanical Association were parties defendant in that suit, and the relief, therefore, granted

by the judgment therein was limited to declaring that the deed purporting to be executed by the corporation to Canfield was null and void as against the State National Bank of Minneapolis, and to directing that said judgment be recorded in the office of the Register of Deeds in Hennepin County, so that said deed should not thereafter be a cloud upon the title of said corporation to said real estate. This judgment was entered on March 17, 1877. An appeal was taken therefrom to the Supreme Court of Minnesota, the decision in which is reported in *Baldwin* v. *Canfield*, 26 Minn. 43.

In that case it was declared by the court that the deed purporting to be made by the association was not the act and deed of such association, and therefore did not convey the title to the premises in question to Canfield. The court further said: "The directors took no action as a board with reference to the sale of the premises, or the execution of any deed thereof. So far as in any way binding the corporation is concerned, their action in executing the deed was a nullity. They could not bind it by their separate and individual action. Hence it follows that the so-called deed is not only ineffectual as a conveyance of real property, but equally so as a contract to convey."

The court also declared as follows: "Upon the facts found and the preceding conclusions of law, the plaintiffs, as holders of the stock, are interested in the preservation of the corporate property, and in preventing it from passing out of the hands of the corporation. If this is so, they have a right to take legal means to preserve the property, to prevent it from being lost to the corporation, or its value from being impaired. If such value is practically impaired by a cloud upon the title of the corporation to real property, they have a right to have the cloud removed. Their ownership of the stock, either general or special, gives them a right to defend it, as in the case of any other property. This right is paramount to any right upon the part of King as the general owner of the stock, or of Canfield as equitable owner of it, for the reason that by the contract of pledge King has subordinated his rights to theirs, while Canfield's right to the stock accrued while the

stock was in the plaintiffs' hands — while they were holding the certificates which are the evidence of its ownership. The certificates were not delivered to Canfield. This fact bound him to take notice of the rights of the plaintiffs as holders of them in pledge."

It was also held, that, subject to the right and interest of the plaintiffs as thus defined, Canfield was in equity the owner of the whole 800 shares of said stock. This judgment was not rendered until May 5, 1879.

In the meantime, and subsequent to the rendition of the judgment in the District Court of the state, on the 10th of July, 1877, the State National Bank gave notice of an intention, on the 25th day of July, 1877, to sell at public auction the 800 shares of the capital stock of the Minneapolis Agricultural and Mechanical Association for the payment of the Brackett notes and the Mendenhall notes made by King.

Said sale having in the meantime been postponed, Canfield filed the original bill in this cause against the Minneapolis Agricultural and Mechanical Association and the State National Bank of Minneapolis, the object and prayer of which were, upon the facts alleged, to assert his equity as owner of the said 800 shares of stock and in the real estate of the Minneapolis Agricultural and Mechanical Association, and in the meantime to enjoin the intended sale of said stock, which had been adjourned to August 15, 1877. On September 13, 1877, an application for an injunction to restrain the said sale, having been previously made and submitted, was denied; and on September 15, 1877, the said sale, originally advertised for July 25, 1877, adjourned to August 15, 1877, and again adjourned to September 15, 1877, took place, and the 800 shares of capital stock of the Minneapolis Agricultural and Mechanical Association were struck off and sold to one J. M. Knight for the sum of $13,000, that being the highest bid for the same. This sum was the estimated amount due to the bank for which it held the stock as collateral; the gas stock, or an equivalent, having in the meantime been returned. At the time of the sale, the State National Bank executed to Knight a guaranty of the title to the stock sold.

On December 31, 1877, Knight sold to Dorilus Morrison 720 shares of his stock in consideration of $12,430.42, Morrison assuming and agreeing "to pay the costs, expenses, and charges incurred and to be incurred in or about certain legal proceedings instituted in respect to the said shares of stock, and in respect to the real estate of said association, in which the State National Bank of Minneapolis and R. J. Baldwin were parties." On February 23, 1878, the Minneapolis Agricultural and Mechanical Association, by its board of directors and officers, executed a deed in fee simple of the seventy acres of land constituting the Fair Ground property to Dorilus Morrison and James M. Knight, nine-tenths thereof to the former and one-tenth to the latter. This deed was executed by the authority of the board of directors elected by Morrison and Knight, as sole stockholders, for that purpose. On October 22, 1878, Morrison conveyed by deed in fee simple to Jacob K. Sidle and Robert B. Langdon his undivided nine-tenths of the said Fair Ground property; Morrison also conveyed to Sidle and Langdon his 720 shares of the capital stock of the Minneapolis Agricultural and Mechanical Association and the guaranty of title to the same by the State National Bank of Minneapolis. The deed to Sidle and Langdon on its face is absolute, but the title was held by them in fact in trust for certain persons, as expressed in written declarations of trust given to each of the *cestuis que trustent.* The following is a copy of one of these declarations:

"MINNEAPOLIS, October 22, 1878.

"Whereas divers persons have advanced to us, J. K. Sidle and R. B. Langdon, sums of money amounting to twenty-nine thousand six hundred and sixty-eight and $\frac{73}{100}$ dollars, wherewith we are to pay off and liquidate the indebtedness of the Northwestern Mechanical and Agricultural Association as to particular matters, and also to pay off certain incumbrances heretofore resting upon an undivided nine-tenths of the fair grounds in the City of Minneapolis, of which sum W. D. Washburn, of said city, has advanced twenty-five hundred dollars; and whereas we have at this date received from

Dorilus Morrison and wife a deed of the same undivided nine-tenths of the said fair grounds, the title to which is, however, in litigation; we therefore agree that, in case the result of the said litigation shall be to validate our title, we shall, as soon as may be reasonable after one year from the date hereof, sell said land, and from the proceeds of such sale pay the said advances to the persons severally making the same, with interest at the rate of ten per cent. per annum, if the sum realized from such sale shall be sufficient to cover such payment. But if the proceeds of such sale shall not be sufficient to pay such advances and interest in full, then we agree to pay and apply such proceeds in payment of such advances *pro rata* to each person in proportion to the amount of the advance by him made. This is the extent of our obligation in the matter, and if our title to the said land shall fail, then no duty or obligation rests upon us."

The circumstances in which the conveyance to Sidle and Langdon was made are shown in the proof and stated by counsel for the appellants in his brief, as follows:

"In the year 1878 a fair was held in Minneapolis, upon the same land, under the auspices of another organization, known as the Minnesota Agricultural and Mechanical Association. At the same time a rival fair was held at St. Paul. Minneapolis, at a large expense, secured the presence of the most famous racing horses and finest blooded bulls. St. Paul secured the attendance of the President of the United States and staff. The competition was great and costly. As is not unusual, the expenditures exceeded the receipts. The Minneapolis deficiency was fourteen thousand dollars over and above all receipts and large amounts of private contributions. This was due for labor and material for buildings on the grounds, services in and about the fair, premiums, advertising, railroad freights, and such other like matters, as would occasion the greatest amount of complaint and public reproach if not paid. It was claimed that Morrison was, as the owner of the land, liable for the material and labor bestowed thereon, and liens were threatened to be filed on the same. Meetings were held by the leading citizens, and it was at last agreed that an

amount of some $30,000 would be contributed, providing Morrison would convey his nine-tenths interest in the land and stock to appellants Sidle and Langdon, in trust for the contributors, in consideration of his being paid the money it had cost him and interest, and of having the taxes paid on said land, and of being relieved from the claims against him on account of labor and material so furnished. The amount of purchase money and interest then amounted to some $14,000; taxes due to over $2000; and the said material and labor for which it was claimed Morrison and the land were liable to some $6000 more, — in all some $22,000. It was also agreed that the trustees should bear all expense of defending the title against any litigation involving it. According to such agreement, Morrison conveyed the said nine-tenths of said land and stock to said Sidle and Langdon, and they executed a written acknowledgment of the trust to each of the contributors. This paper stated the amount of each contribution, and the obligation to sell the land as soon as the title should be cleared from litigation, and pay the amount of advance and ten per cent. interest, if proceeds were sufficient, and if not to pay *pro rata*. No provision was made as to distribution in case of a surplus. Such was either not contemplated, or forgotten, or, as is very probable, it was hoped that some means might be developed to secure the land for a public fair ground for the city.

"Dorilus Morrison was one of the contributors to this general fund to the amount of $3000. There were also contributions made by Farnham and Lovejoy, and three railroad companies, aggregating some $6500, which were met by claims against Morrison and the 'Fair Association.' The remainder was contributed by citizens having no interest in the matter, except the reputation of the city, and among others appellant Langdon contributed $7000 and appellant Sidle $2500."

On August 14, 1880, the complainant, on leave, filed his supplemental and amended bill in this case, to which he made as additional parties defendant Knight, Morrison, Baldwin, King, Sidle, Langdon, William D. Washburn, S. W. Farnham.

James A. Lovejoy, and George A. Brackett, all citizens of Minnesota. This amended and supplemental bill, in substance, after reciting the original bill, charged that at the time of the pretended sale of the 800 shares of the capital stock of the State National Bank to Knight, the bank had no rightful lien thereon by way of pledge for any unpaid debt, having in fact released the same by its agreement with King to accept from him $36,000 of the Northern Pacific Railroad bonds in satisfaction thereof. It further charges that the said pretended sale to Knight was no sale at all, but was merely a contrivance for the purpose of converting the title of the bank as pledgee into an absolute title, in fraud of the complainant, and that consequently Knight, by virtue of said sale, acquired no better title than that previously held by the bank. It is further claimed that Morrison as assignee of nine-tenths of the said stock, and Sidle and Langdon as his assignees, purchased with full notice of all the equities of the complainant, and therefore are not purchasers in good faith. The amended and supplemental bill, therefore, seeks to charge Sidle, Langdon, and Knight as holders of the legal title to the stock and the property represented by it in trust for the benefit of the complainant, and prays for an account and a conveyance.

The cause was heard upon bill, answers, replication, exhibits, and testimony, and a final decree was rendered in favor of the complainant, establishing his equity as the owner of the stock and corporate property of the Minneapolis Agricultural and Mechanical Association, subject to the payment to James M. Knight of the sum of $569.58, and to the payment to Jacob K. Sidle and Robert B. Langdon of the sum of $8646.55. From that decree this appeal is prosecuted by the defendants below.

It was argued at the bar that Canfield acquired a complete equitable title to the real estate of the Minneapolis Agricultural and Mechanical Association by virtue of the sale thereof to him by King by the contract in writing of August 14, 1873, and by the deed in pursuance thereof, purporting to be made by the corporation, dated August 15, 1873. The ground of

this contention is, that in that negotiation and transaction King rightly represented the corporation as its agent, and that the deed, if defective to convey the legal title, because not formally authorized by the directors at a meeting of the board, was such as equity would correct and reform so as to carry into effect the intention of the parties.

This view of the question, however, is not now open; the effect of that conveyance, both at law and in equity, having been finally adjudged between Canfield and the State National Bank by the Supreme Court of Minnesota. That judgment, as between those parties and those in privity with them, conclusively establishes, for the purposes of this case, that the deed was void at law, and that the equity of the State National Bank to the stock, and in the land as a pledge for the payment of the debt for which the stock had been hypothecated, was superior to that of Canfield. We must assume, therefore, at the outset of our present inquiry, that at the date of the alleged sale of the stock to Knight, Canfield's equity consisted merely in a right to redeem the pledge, unless it had been previously released by the bank. This, upon the evidence, we find not to be the case. The agreement between the bank and King, claimed to have that effect, cannot operate as such. It was an agreement merely on the part of the bank that it would exchange the stock for the agreed amount of Northern Pacific Railroad bonds, to take effect upon mutual deliveries. King was not the agent of the bank to receive the bonds from Canfield; the title of the bank to the stock was never relinquished by it.

On the other hand, we adopt the conclusion of the court below as to the nature of the alleged sale of the stock by the bank to Knight. We are satisfied from the evidence that it was no sale at all; nothing was paid by Knight, and the stock was not delivered to him; it was not in fact a real transaction. The legal title of the stock was shifted from the bank to Knight, but Knight acquired by the transaction no other or better right than that of the bank; he still held it subject to Canfield's equitable right to redeem. Neither was Morrison, after the conveyance of nine-tenths of the stock to him by

Knight, in any better condition. He had full notice of the complainant's equity, and, as we think, of the nature of Knight's title; consequently he and Knight thereafter, each for his own proportion, held the stock, and the real estate of which they had procured a conveyance from the association, subject to the equity of Canfield. Sidle and Langdon are in the same plight; they took their title with express notice of Canfield's equity, and subject to the consequences of the pending litigation the burden and expenses of which they agreed to assume. They are entitled to hold the property only on the same conditions attached to it in the hands of Knight and Morrison; they succeeded only to Morrison's title. As against Canfield, the complainant below, however, his equity being the right to redeem the property as against the bank on the payment of its debt, the same burden rests upon it in favor of the present holders of the title, derived by successive assignments from the bank. The decree below, as a condition of redemption against Sidle and Langdon, required only the payment by Canfield of the sum of $8646.55, which was the amount paid in cash, on November 20, 1878, by Sidle and Langdon, to take up two of the notes given by Morrison for the payment of the purchase money from the bank, but that amount does not represent the full amount of Morrison's payment.

The whole amount paid by Morrison for nine-tenths of the stock, the aggregate of three notes given at the purchase, was $12,430.43, *and Canfield, in the exercise of his privilege of redemption, should be charged with the full amount due on that account. To the extent of the difference between that sum and the sum actually charged in the decree appealed from, the decree should be modified. In all other respects it is affirmed, the costs in this court being equally divided. The cause is accordingly remanded to the Circuit Court for further proceedings in conformity with this opinion.*

HUISKAMP *v.* MOLINE WAGON CO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Argued April 6, 1887. — Decided April 18, 1887.

In an attachment suit in Missouri the defendant, R., filed a plea in abatement, on which a trial was had, sustaining the abatement. The attachment had been levied on goods claimed by H., by transfer from R., and H. filed an interplea, which was tried. On the trial the court admitted in evidence the proceedings on the trial on the plea in abatement, to show that the transfer was fraudulent on the part of R.; *Held*, that this was error, because H. was not a party to the proceedings on the plea in abatement.

One partner may, with the consent of his copartner, apply the partnership property to the payment of his individual debt, as against a creditor of the partnership, who has acquired no lien on the property.

Where such payment is claimed to be lawful on the ground that the property so applied has become the individual property of the partner making the payment, no creditor of the partnership acquires any right in respect of the property by the fact that he does not know of the transfer of the property to such partner, so long as he has no lien on the property, and it is applied in good faith by such partner to pay his individual debt.

On the 8th of January, 1880, the Moline Wagon Company, an Illinois corporation, commenced an attachment suit in the Circuit Court of Putnam County, in the state of Missouri, against Jacob Rummel and Edwin R. Cutler, copartners under the name of J. Rummel & Son. The suit was brought under a statute of Missouri, and claimed an indebtedness of $6722.61. The ground on which the attachment was issued was that the defendants had "fraudulently conveyed or assigned their property or effects so as to hinder and delay their creditors," and had "fraudulently concealed, removed or disposed of their property or effects so as to hinder or delay their creditors," and were "about fraudulently to convey or assign their property or effects so as to hinder or delay their creditors." Under this attachment, the sheriff, on the 9th of January, 1880, seized a quantity of goods in the possession of the firm of Huiskamp Brothers, the proceeds of which are

the subject of controversy. These goods were subsequently sold as perishable property, and the proceeds, $5246.50, were placed in court.

On the 15th of March, 1880, the plaintiff removed the suit into the Circuit Court of the United States for the Western Division of the Western District of Missouri. Prior to the sale of the goods, and on the 8th of May, 1880, Huiskamp Brothers filed in the suit, under the statute of Missouri, what is called an interplea, claiming to be the owners of the goods attached, and to have been such owners at the date of the levy of the attachment, and demanding a return of the property.

On the 17th of May, 1880, Rummel filed a plea in the nature of a plea in abatement, denying the indebtedness, denying the several frauds alleged, and praying for an abatement of the attachment and a release of the property. After the sale of the property, and on the 17th of May, 1881, Huiskamp Brothers filed an amended interplea, claiming that when the goods were seized the same belonged to them and were in their possession; that the goods were wrongfully seized; and that the proceeds of their sale, in court, amounting to $5246.50, were their property. The plaintiff answered the amended interplea and denied its allegations. A trial of the interplea was had before the court and a jury in October, 1882, at which a verdict was found that the property attached and the proceeds thereof "were not and are not the property of the interpleaders," on which a judgment was entered for the plaintiff and against the interpleaders, to review which the interpleaders brought this writ of error.

The mode of procedure by interplea, in an attachment suit, where a third party claims the attached property, was authorized by § 449 of the Revised Statutes of Missouri, of 1879, which is as follows: "Any person claiming property, money, effects, or credits attached, may interplead in the cause, verifying the same by affidavit, and issues may be made upon such interplea, and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay."

The bill of exceptions contained the following statement as to the proceedings had at the trial:

"The interpleaders, in support of their title to the property in controversy, offered testimony, which was admitted, tending to prove such title, as follows:

"First. A chattel mortgage, made by defendant Jacob Rummel, to the interpleaders, on the stock of merchandise, the proceeds of which are in controversy, dated December 24, 1879, and the notes of said Jacob Rummel to said interpleaders secured thereby, of same date, one for $2500 and one for $1500, each due one day after date, and bearing ten per cent. interest from date. Said mortgage was signed and acknowledged in due form and filed for record in the office of the recorder of deeds of Putnam County, Missouri, on January 1, 1880. Said mortgage provided that the mortgagees might sell the mortgaged property at public sale on ten days' notice.

"Second. That said stock of merchandise was actually transferred and delivered to the interpleaders on January 6, 1880, prior to the seizure of the same under the writ of attachment issued in the case of the plaintiffs against the defendants.

"The interpleaders further offered testimony, which was admitted in evidence, tending to show that they were wholesale dealers in boots and shoes in the city of Keokuk, Lee County, Iowa, and had been for many years; that, prior to January, 1878, the defendants Jacob Rummel and Son were partners engaged in business in the town of Unionville, Putnam County, Missouri, under the firm name of Rummel & Son, and their business was that of general retail merchandise, including farming implements, wagons, &c.; that, in January, 1878, the said partners dissolved said firm and divided the property and business thereof, and both of said partners informed the interpleaders of such dissolution.

"That, after such dissolution, the said Jacob Rummel continued at the same place the general retail merchandise business, and the defendant Ed. R. Cutler engaged in the business of selling agricultural implements, including wagons; that, after January, 1878, as between themselves, the said Rummel had no interest in the profits or losses of the business carried on by Cutler in the agricultural implement busi-

ness, and Cutler no interest in the profits or losses of the merchandise business; that the indebtedness for which the stock of merchandise was mortgaged or pledged was for goods sold to Jacob Rummel after the dissolution and division of the business and property of the firm of Rummel & Son; that, when the interpleaders took the mortgage, and also when they took possession of the stock of merchandise, they understood that the same belonged to Jacob Rummel, and had been led to so believe from the statements of both Cutler and Rummel; that they took said mortgage and possession of said stock of merchandise in good faith, to secure their debt, and not to hinder, delay, or defraud, or to assist in hindering, delaying, or defrauding, the creditors of the said Rummel or Rummel & Son; that Rummel made the conveyance and transfer to the interpleaders in good faith, to secure their debt, and not with the fraudulent purpose of hindering, delaying, or defrauding his creditors, or those of the firm of Rummel & Son."

Luke Huiskamp, one of the interpleaders, testified to the circumstances under which Huiskamp Brothers took the mortgage and entered into possession of the mortgaged property. His testimony showed that they did so upon the understanding and belief, derived from both Rummel and Cutler, that the property belonged to Rummel; and that the only purpose of Huiskamp Brothers was to secure *bona fide* debts due to them, and to certain other creditors, by Rummel.

The bill of exceptions then went on to state as follows:

"Jacob Rummel, a witness for the interpleaders, on his cross-examination, among other things, testified, that Thomas M. Fee was the attorney of interpleaders, and was present at the time of the taking possession by the interpleaders of the property in controversy, and has been such attorney from that time until the present; that, at the time of the trial of the plea in abatement of Rummel, said Fee was the attorney of Rummel, and was employed by Rummel to assist, and did assist, in the trial of such plea in abatement.

"The plaintiffs offered testimony, which was admitted in evidence, tending to show that the interpleaders took the

mortgage on, and possession of, the stock of merchandise in controversy, not in good faith, but to assist the defendant Cutler in hindering, delaying, and defrauding his creditors and the creditors of the firm of Rummel & Son; that there was no dissolution of the firm, or division of the firm property, in January, 1878, or afterwards; that Jacob Rummel made the transfer and conveyance to interpleaders with the intent to hinder, delay, and defraud his creditors; that plaintiffs were engaged in the manufacture and sale of wagons, and had been for many years, and had, prior to January, 1878, dealt with Rummel & Son, and continued to deal with them, after that time; that they never knew of the dissolution of said firm or division of its property, and there never was any published notice of such dissolution; that the debt on which they brought suit in the attachment proceedings was contracted on their part under the belief that the firm of Rummel & Son was still in existence."

The plaintiff then offered in evidence the affidavit on which the attachment was issued in the main suit against Rummel and Cutler, the plea in abatement of Rummel thereto, and that part of the record in the attachment suit which showed the proceedings on the trial of such plea in abatement, including the verdict and the judgment, the verdict being the finding of the issues for the plaintiff, and the judgment being that the plea in abatement be overruled and the attachment sustained. The interpleaders objected to the introduction of the affidavit, plea in abatement, record entries, verdict and judgment, upon the grounds that they were not parties to the trial and issues on the plea in abatement, "and that the issues tried thereon were entirely separate and distinct from the issues upon trial here, and hence the testimony is irrelevant and immaterial, relating to different parties and different subject matter." The bill of exceptions stated that "the court overruled the objections of the interpleaders and admitted said papers for one purpose, to show that the conveyance and transfer of the stock of merchandise in controversy to the interpleaders was fraudulent on the part of Jacob Rummel; to which action of the court, in overruling said

objections and admitting said testimony, the interpleaders at the time excepted."

Under the statute of Missouri, writs of attachment are obtained at the time of or after the commencement of the suit, upon an affidavit specifying one or more of the statutory causes of attachment. Sections 438 and 439 of the Revised Statutes of Missouri provide for the filing by the defendant in the attachment, of a plea, in the nature of a plea in abatement, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out, and for a trial of the issue.

In addition to the ruling as to the proceedings on the plea in abatement, the court, in charging the jury, said: "In the attachment suit between the Moline Wagon Company and Rummel and Cutler, Rummel filed what in law is termed a plea in abatement; that is, he denied the facts alleged in the affidavit made by the company to obtain the attachment. The law allows attachments to issue and property to be seized in cases only where debtors have dealt, or are about to deal, with their property in an illegal way. The affidavit made by the Moline Wagon Company at the time they sued out their attachment, in appropriate legal language charged that Rummel and Cutler had or were about fraudulently to convey their property so as to hinder and delay their creditors in the collection of their debts. This charge Rummel denied. A trial which was had on this issue resulted in the sustaining of the attachment; that is, the charge made in the affidavit by the Moline Wagon Company, that Rummel had fraudulently conveyed, or was about fraudulently to convey, the property in controversy, to hinder and delay creditors, was true. Cutler, the defendant with Rummel in the attachment suit, did not appear, and thereby confessed the charge of fraud."

The court also said in its charge: "So far as the intent to defraud, hinder, and delay creditors on part of Rummel is concerned, a trial of that issue has been had in this court, with the result brought to your notice by reading from the records. The intention of Rummel in making the mortgage to Huiskamp Brothers was found to have been fraudulent.

but this of itself is not sufficient to make the mortgage fraudulent as to Huiskamp Brothers. Huiskamp Brothers may have known, when they accepted the mortgage from Rummel, that he intended to defraud, hinder, and delay his creditors by it; yet, if they in no way participated in the fraud of Rummel, did no act to aid or assist him in the illegal act, and intended to secure their debt only, the mortgage as to them is valid, and they are entitled to the benefit of the same; but, on the other hand, if, aside from the securing of their own debt, Huiskamp Brothers, by and through the mortgage, undertook to aid and assist Rummel in his fraudulent purposes to hinder and delay the Moline Wagon Company, or any other creditor, in the collection of their debt, in such case the mortgage is void, and they can claim nothing under it, as against creditors. This is the important question in the case, and you should carefully examine the whole of the testimony bearing upon this point."

The interpleaders excepted to those portions of the charge which referred to the trial of the issues between the plaintiff and Rummel, on the ground that neither the proceedings on Rummel's plea in abatement, nor Cutler's confession of the charge of fraud made in the affidavit, could affect the rights of the interpleaders.

Mr. James Hagerman for plaintiffs in error.

Mr. C. M. Osborn and *Mr. S. A. Lynde* for defendant in error.

I. (1) If there was no legal dissolution of the partnership, and the partners continued to hold the property in controversy as partnership property, and to deal with it ostensibly as firm property, it remained partnership property so far as creditors are concerned who knew nothing of a division of the property and who trusted the firm.

(2) Where partners continue to carry on business as partners, and under the firm name, and to hold property and deal with it ostensibly as partnership property, such property remains partnership property, notwithstanding a secret agreement of

division of property may have been entered into between the partners, and so far as creditors are concerned who knew nothing of such agreement and gave credit to the firm, the partners, and any purchaser or grantee from them in their individual capacity with notice that the property was being held and ostensibly dealt with by the partners as partnership property, will be equitably estopped from denying its status as partnership property. "The creditors who had dealt with the firm under the belief, superinduced by the acts of all the parties, that they were partners, were entitled to rely not only upon the personal responsibility of all, but upon the equitable security in the partnership effects to be worked out through them." *Kelly* v. *Scott*, 49 N. Y. 595, 599; *Hillman* v. *Moore*, 3 Tenn. Ch. 454, 458. See also *Ex parte Hayman*, 8 Ch. Div. 11; *In re Rowland*, L. R. 1 Ch. 421; *French* v. *Chase*, 6 Greenl. 166; *Lord* v. *Baldwin*, 6 Pick. 348; *Van Valen* v. *Russell*, 13 Barb. 590; *Elliot* v. *Stevens*, 38 N. H. 311.

(3) By a *bona fide* agreement of dissolution and division of partnership property among the partners, or by a *bona fide* transfer of the partnership property to one partner, it is converted into the individual separate property of the partner, wholly free from the claims of the joint creditors, and the partnership creditors are deprived of their quasi lien or derivative equity. *Case* v. *Beauregard*, 99 U. S. 119; *Fitzpatrick* v. *Flannagan*, 106 U. S. 648; *Schmidlapp* v. *Currie*, 55 Mississippi, 597.

(4) To be valid, however, such transfer or agreement of dissolution and division of the partnership effects must be *bona fide;* and if not it is invalid and a nullity, save only in the case of a *bona fide* purchaser for a valuable consideration without notice of the *mala fides* of the transaction. *Case* v. *Beauregard*, 99 U. S. 119; *Howe* v. *Lawrence*, 9 Cush. 555, 556;[1] *Wilson* v. *Robertson*, 21 N. Y. 587; *Ransom* v. *Van Deventer*, 41 Barb. 307; *Ex parte Williams*, 11 Ves. 3, 5; *In re Waite*, 1 Lowell, 207.

(5) A secret agreement of this character between the partners which is not made public or accompanied by public notice and by some open and visible evidence of its existence is fraud-

[1] *S. C.* 57 Am. Dec. 68.

ulent and void. *In re Tomes*, 19 Nat. Bank. Reg. 37; *In re McFarland*, 10 Nat. Bank. Reg. 381; *Flack* v. *Charron*, 29 Maryland, 311; *Elliot* v. *Stevens*, 38 N. H. 311; see, also, *In re Shepard*, 3 Ben. 347; *In re Krueger*, 2 Lowell, 66; *In re Dunkle*, 7 Nat. Bank. Reg. 107; *Kelly* v. *Scott*, 49 N. Y. 595.

(6) A conveyance or mortgage of partnership property made by a partner in his individual behalf to satisfy or secure the payment of his individual debts is fraudulent and void as to the partnership and its creditors. *Rogers* v. *Batchelor*, 12 Pet. 221; *Locke* v. *Lewis*, 124 Mass. 1; *Livingston* v. *Roosevelt*, 4 Johns. 251;[1] *Dob* v. *Halsey*, 16 Johns. 34;[2] *Flanagan* v. *Alexander*, 50 Missouri, 50; *Ackley* v. *Staehlin*, 56 Missouri, 558; *Price* v. *Hunt*, 59 Missouri, 258; *Hilliker* v. *Francisco*, 65 Missouri, 598; *Phelps* v. *McNeely*, 66 Missouri, 554; *Johnson* v. *Hersey*, 70 Missouri, 74; *Cotzhausen* v. *Judd*, 43 Wis. 213; *Hurt* v. *Clarke*, 56 Ala. 19. Save only where the grantee or person dealing with the partner did not have notice that the property was partnership property, or that the partner was abusing his powers and authority as a member and agent of the partnership. *Locke* v. *Lewis*, 124 Mass. 1; *Livingston* v. *Roosevelt*, 4 Johns. 251.[1] If he did have notice, the transaction is deemed *mala fide* on his part, and held to be a nullity. *Donovan* v. *Dymond*, 3 Woods, 141; *Cotzhausen* v. *Judd*, 43 Wis. 213.

II. The judgment on the plea in abatement sustaining the attachment and overruling the plea was conclusive evidence of fraud on Rummel's part in executing and delivering the mortgage under which the interpleaders claim title, as against the interpleaders who had become parties to the cause and had interpleaded therein prior to the trial of the plea in abatement. The interpleaders became by their interplea parties to the cause, and were parties and privies in interest with Rummel, their grantor and defendant in the cause. Rev. Stat. Missouri, § 449: "Any person claiming property, money, effects, or credits attached, may interplead in the case, verifying the same by affidavit, and issues may be made upon such interplea, and shall be tried as like issues between plaintiff and defendant, and without any unnecessary delay." See as to

[1] *S. C.* 4 Am. Dec. 273. [2] *S. C.* 8 Am. Dec. 293.

interplea under this statute: *Richardson* v. *Jones*, 16 Missouri, 177; *Richardson* v. *Watson*, 23 Missouri, 34; *Brennan* v. *O'Driscoll*, 33 Missouri, 372; *Ladd* v. *Couzins*, 35 Missouri, 513; *State* v. *Langdon*, 57 Missouri, 353; *McElfatrick* v. *Macauley*, 15 Missouri App. 102; *Wolff* v. *Vette*, 17 Missouri App. 36. See, also, *French* v. *Sale*, 60 Mississippi, 516; *Brown* v. *Dudley*, 33 N. H. 511; Bigelow on Estoppel, 131, 132, 133. And (as exception to the general rule) that judgment against the principal is conclusive on the surety. *Stovall* v. *Banks*, 10 Wall. 583; *Stoops* v. *Wittler*, 1 Missouri App. 420; *Strong* v. *Ins. Co.* 62 Missouri, 289. And as to status of party in interest, though not party to the record. *Wood* v. *Ensel*, 63 Missouri, 193.

Mr. Justice Blatchford, after stating the case as reported above, delivered the opinion of the court.

Although the transaction between Rummel and Huiskamp Brothers may have been the subject of the trial on the plea in abatement, we are of opinion that the evidence in question was improperly admitted. In order to invalidate the mortgage of Rummel to Huiskamp Brothers it must have been made with the intent, on the part of Rummel, to hinder and delay his other creditors, and Huiskamp Brothers must have accepted it with the intent of assisting Rummel to hinder and delay his other creditors. A debtor in failing circumstances having the right to prefer a creditor, if the preferred creditor has a *bona fide* debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent and that the debtor's intention is to hinder and delay other creditors. It was necessary, therefore, for the plaintiff, on the trial of the issue with the interpleaders, to make proof of the unlawful intent of Rummel in making the mortgage, irrespective of any intent of Huiskamp Brothers in accepting it. Such proof could not be made as against the interpleaders, in view of what the evidence which they offered tended to show, by proving that the issue

as to the intent of Rummel had been tried and found against him in the trial on his plea of abatement. That was an issue to which the interpleaders were not parties, and the record of its trial was wholly inadmissible as against the interpleaders. The bill of exceptions states that the papers were admitted to show "that the conveyance and transfer of the stock of merchandise in controversy to the interpleaders was fraudulent on the part of Jacob Rummel." The interpleaders were not parties to the proceedings, did not appear in them, did not control them, and cannot be affected by them. For this error there must be a new trial; but, as there were other parts of the charge of the court, and refusals of the court to charge as requested by the interpleaders, which were excepted to, and which we think were erroneous, and which may recur upon a new trial, it seems proper to consider them.

The following portion of the charge of the court was excepted to: "But if no legal dissolution of the partnership took place in January, 1878, or since, and the partners continued to hold the property in controversy as partnership property, bought, sold, and advertised it as firm property, such property remained partnership property, so far as creditors are concerned, who knew nothing of the division and who trusted the firm. Under the view of the case last presented you will have to determine whether there was a dissolution of the partnership. As already stated, it is an undisputed fact, that, up to January, 1878, a partnership between Rummel and Cutler did exist; that that partnership dealt in general merchandise, including farming implements, wagons, etc., and that dealings prior to that time were had between the Moline Wagon Company and the firm of Rummel & Son. The Moline Wagon Company had a right to presume that the persons once composing a firm, and who continued doing business under the firm name, are still partners, and that the partnership continues to exist until notice of a dissolution was given. No agreement or understanding between the partners — no division of the property of the firm — can relieve either the firm or the partners of their legal liability as to creditors who extend credit to the firm, nor are creditors who extend credit to the firm bound

to regard public rumors, even if they heard them, if the partners continue the partnership name and avail themselves of the partnership credit. You are, therefore, instructed that the partnership between Rummel and Cutler existing in 1878 continued to exist up to the time of the creation of the debts sued on by the Moline Wagon Company, unless public notice of the dissolution of the partnership was given, or actual notice of such dissolution was brought home, to the Moline Wagon Company. If, under this view of the law, you shall find, from the evidence, that plaintiff, the Moline Wagon Company, gave credit to the firm of Rummel & Son, composed of Rummel and Cutler, then the firm and each of the partners are liable for the debt thus contracted. All of the assets of the partnership, both merchandise, notes, and accounts, as well as all wages and property of the partnership which Cutler" [Rummel?] "may have handled in his division of the partnership, as well as all notes and accounts which Cutler may have taken, together with all property of the partners, in case of insufficiency of partnership assets, are liable for debts created by the partnership. If you shall find that the partnership once existing between Rummel and Cutler had not been dissolved, and the property in dispute to be partnership property, then Rummel could not take such partnership property and pay an individual debt with it, such as Huiskamp Brothers claim to have, and the mortgage read in evidence, given them, is void as against creditors of the firm."

In connection with this portion of the charge, the interpleaders requested the court to give the following instructions to the jury:

"3. If the jury find, from the evidence, that Rummel and Cutler led Huiskamp Brothers to believe that the goods belonged to Rummel, and they accepted the mortgage and took the goods under such belief, then they are entitled to the same rights, by virtue of the mortgage and their possession, as if the goods actually belonged to Rummel at the time the mortgage was made, and when they took possession of the goods."

"4. If the jury find, that, as between Rummel and Cutler, the

goods belonged to Rummel at the time he made the mortgage and Huiskamp Brothers took possession of the same, then the interpleaders are entitled to recover, although, as to the plaintiffs in this case, the firm of Rummel & Son was in existence by reason of the fact that the plaintiffs had never been notified of any change of the firm of Rummel & Son. In such case, Rummel & Son would be liable to the plaintiffs, but the plaintiffs would have no lien on the stock of goods, and Huiskamp Brothers could acquire title thereto by a valid mortgage from Rummel."

"5. There is a difference between the dissolution of a firm and the settlement of the accounts of the partners between themselves and the firm. A partnership may be dissolved and the property divided in part, leaving the settlement of the accounts between the partners to be effected in the future; and, in this case, if the firm of Rummel & Son was dissolved in 1879, and Rummel took the stock of merchandise, with the consent of his copartner, and was to be charged therewith, then from that time, as between Rummel and Cutler, the former would be the owner of the goods, and could make a valid mortgage of the same in his own name."

"7. The test of a partnership, as between the partners, is the sharing of the profits and the losses of the business; and, in this case, if, after January 18, 1878, Cutler was not to share the profits and losses of the store business, but Rummel alone was to have such profits and bear such losses, then after that time, as between themselves, they were not partners in fact. If they should lead others to believe that they were partners, then they would be liable to whoever acted on such belief and gave them credit. Such creditors would not, however, have a lien on the property belonging to one of the partners, as between themselves, and could not claim the same from a party who, in good faith, for value, took such property from the partner really owning it."

The court refused to give these instructions, and to its action in respect to each the interpleaders excepted.

The substance of the concluding sentence of the portion of the charge last above recited is, that, even though the partner-

ship between Rummel and Cutler was not dissolved, and the property continued to be partnership property, it was not in the power of Rummel, even with the consent of Cutler, to take any of such property and pay with it the individual debt of Rummel to Huiskamp Brothers, and, therefore, the mortgage to them was void, as against the plaintiff. The plaintiff had introduced testimony on the trial tending to show that there was no dissolution of the firm of Rummel & Son, nor any division of the firm property, in January, 1878, or afterwards; and the instruction referred to was based upon the view that the jury might find that the partnership was never dissolved, and its property never divided. But the instruction was contrary to the ruling in the case of *Fitzpatrick* v. *Flannagan*, 106 U. S. 648, 654, where this court, speaking by Mr. Justice Matthews, said: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, so long as the partner himself, in the language of this court in *Case* v. *Becuregard*, 99 U. S. 119, 125, 'retains an interest in the firm assets, as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.'"

It follows, from this view, that, even though the partnership of Rummel & Son was not dissolved, Rummel had the right, with the consent of Cutler, to appropriate the property to the payment of his individual debt to Huiskamp Brothers, because the plaintiff, at the time the mortgage was made by Rummel to Huiskamp Brothers, had no specific lien upon the

property, and there was no trust impressed upon it at that time, which could be enforced by the plaintiff. It was only necessary that the disposition of the property should have been *bona fide* on the part of both parties, and without any intent to hinder or delay the plaintiff. *Howe* v. *Lawrence*, 9 Cush. (Mass.) 553,[1] and cases there cited; *Locke* v. *Lewis*, 124 Mass. 1.

It was also error in the court to refuse to charge as requested in the 4th prayer of the interpleaders, that if, as between Rummel and Cutler, the goods belonged to Rummel, the interpleaders were entitled to recover, although the plaintiff had not been notified of any change in the firm of Rummel & Son; and error to charge as it did, the converse of this proposition. The fact of notice or no notice to the plaintiff could not affect the question in issue, so long as the plaintiff had acquired no lien on the goods prior to the mortgage by Rummel to the interpleaders, and that mortgage was made in good faith.

It was also error in the court to refuse to charge, as requested in the 5th prayer of the interpleaders, that "if the firm of Rummel & Son was dissolved in 1879, and Rummel took the stock of merchandise, with the consent of his copartner, and was to be charged therewith, then, from that time, as between Rummel and Cutler, the former would be the owner of the goods, and could make a valid mortgage of the same in his own name." The proposition involved in this request presupposes, of course, that the transaction between Rummel and Cutler was made in good faith, and in that view, the instruction requested was in accordance with the rule laid down by this court in *Case* v. *Beauregard* and approved in *Fitzpatrick* v. *Flannagan*, to the effect, that "if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end." See also *Howe* v. *Lawrence*[1] and *Locke* v. *Lewis*, (above cited).

The judgment of the Circuit Court is reversed, and the case is remanded, with a direction to award a new trial.

[1] *S. C.* 57 Am. Dec. 68.

MAXWELL LAND-GRANT CASE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Argued March 8, 9, 10, 11, 1887. — Decided April 18, 1887.

It does not satisfactorily appear that the grant of Governor Armijo of 1841 to Beaubien and Miranda, since ascertained to amount to 1,714,764.94 acres, was of that character which, by the decree of the Mexican Congress of 1824, was limited to eleven square leagues of land for each grantee.

It does appear that, though the attention of Congress was turned to this question, it confirmed the grant in the act of June 21, 1860, to the full extent of the boundaries as described in the petition of claimants.

In such case the courts have no jurisdiction to limit the grant, as the Constitution, by Article IV, § 1, vests the control of the public lands in Congress. *Tameling* v. *United States Freehold Co.*, 93 U. S. 644.

While courts of equity have the power to set aside, cancel, or correct patents or other evidences of title obtained from the United States by fraud or mistake, and to correct under proper circumstances such mistakes, this can only be done on specific averments of the mistake or the fraud, supported by clear and satisfactory proof.

The general doctrine on this subject is, that, when in a court of equity it is proposed to set aside, to annul, or correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.

Where the purpose is to annul a patent, a grant, or other formal evidence of title from the United States, the respect due to such an instrument, the presumption that all the preceding steps required by law had been observed, the importance and necessity of the stability of titles dependent on these official instruments, demand that the effort to set them aside should be successful only when the allegations on which this attempt is made are clearly stated and fully proved.

In this case the evidence produces no conviction in the judicial mind of the mistakes or frauds alleged in the bill, and the decree of the Circuit Court dismissing it is affirmed.

The United States filed this bill in equity to set aside a patent dated May 19, 1879, granting to Charles Beaubien and Guadalupe Miranda, 1,714,764.94 acres of land in New Mexico and Colorado. The location of the land is shown on Map

No. 2, in the opinion of the court. After the taking of proof by complainant an amended bill was filed December 5, 1883. The respondents demurred, and the demurrer being overruled answered, and, after hearing, the bill was dismissed. From this decree the United States appealed.

The Republic of Mexico in 1841 made a grant of land to Beaubien and Miranda, accompanied by juridical possession, according to the forms of Mexican law. A sketch of the official diseño, forming part of the giving of possession is in the opinion of the court, Map No. 1. The description will be found in the opinion of the court, *post*, 361.

On the 15th of September, 1857, the surveyor general of New Mexico, pursuant to § 8 of the act of Congress of July 22, 1854, establishing the office of surveyor general of New Mexico, &c., reported the grant to Congress for confirmation as "a good and valid grant according to the laws and customs of the Government of the Republic of Mexico and the decisions of the Supreme Court of the United States, as well as the treaty of Guadalupe-Hidalgo." The grant was accordingly confirmed, as recommended by the surveyor general, June 21, 1860, 12 Stat. 71.

In 1869, having previously become the proprietor of the grant, Maxwell applied to the land department for its survey, claiming that it comprised about 2,000,000 acres lying partly in Colorado, but mainly in New Mexico. The matter of the survey was in due course taken to the Secretary of the Interior, and on the 31st of December, 1869, Secretary Cox decided that the confirmed grant was limited to two tracts of eleven square leagues each. In 1871, the Maxwell Land-Grant and Railway Company, having meantime become the owner of the grant, renewed the application for a survey and patent under the claim as put forth by Maxwell in 1869: this application was refused by Secretary Delano upon the ground that the decision of Secretary Cox was final as to the extent of the grant so far as the Executive Departments were concerned. In March, 1877, the Maxwell Land-Grant and Railway Company made another application for a patent upon the claim of locality and extent as theretofore. A survey was

ordered and executed the same year, and the patent issued under the survey May 19, 1879.

These were the facts as claimed by the United States, and in this court their counsel maintained that the decree dismissing the bill was erroneous in the following respects:

"*First.* The grant of the Republic of Mexico could not under Mexican laws, exceed altogether twenty-two square leagues, equivalent to 97,424.8 acres of land, to be found within the outboundaries designated.

"*Second.* The report of the surveyor general of September 17, 1857, recommended the grant for confirmation for no greater quantity of land than twenty-two square leagues.

"*Third.* The confirmatory act of June 21, 1860, did not operate as a grant *de novo* for the land in excess of twenty-two square leagues.

"*Fourth.* The survey under which the patent issued and the patent itself, included, in addition to the twenty-two square leagues, many hundred thousand acres *within* the outboundaries designated in the grant proceedings, not included in the grant as confirmed, and also several hundred thousand acres (about 400,000) lying upon the outside of the eastern and northern outboundaries, also not included in the confirmed grant.

"*Fifth.* The patent was issued by the officers of the Land Department to include the lands *within* the outboundaries set down in the grant proceedings, in excess of twenty-two square leagues, inadvertently and by mistake caused by ignorance of the law and of their authority in the premises, and to include the lands *outside* the outboundaries, inadvertently and by mistake produced by the frauds and deceits practised upon the Commissioner of the General Land Office by the owners of the grant and their agents, and by Surveyor General Spencer, and the deputy United States surveyors, Elkins and Marmon, in the interest of such owners.

Mr. Assistant Attorney General Maury for appellant.

The grant to Beaubien and Miranda is a Mexican grant and not a United States grant. Since the change of sovereignty

it has never been treated as anything but a Mexican grant, pure and simple.

The surveyor general who passed upon it under the eighth section of the act of July 22, 1854, in his report recommending the confirmation of the grant, commends it to Congress as "a good and valid grant *according to the laws and customs of the Government of the Republic of Mexico and the decisions of the Supreme Court of the United States* as well as the treaty of Guadalupe-Hidalgo of February 2, 1848, and is therefore confirmed to Charles Beaubien and Guadalupe Miranda, and is transmitted for the action of Congress in the premises." And Congress, in passing on this grant by the act approved June 21, 1860, expressly confirms the same "*as recommended for confirmation by the surveyor general*" of New Mexico.

Being a Mexican grant in the beginning, and subject to the laws and customs of Mexico, it is for this court to determine whether there exists any authorized process of evolution, by which this original Mexican grant of twenty-two square leagues to Beaubien and Miranda could have grown and expanded into the princely domain covered by the patent. Certainly there is nothing in the treaty of Guadalupe-Hidalgo that warrants the exaggeration which has been given to this grant, for the treaty merely provides for the protection of persons and property in the ceded territory, which, indeed, is no more than is guaranteed by the law of nations in such cases. That there is nothing in the laws of Mexico or the United States that justifies the exaggeration complained of, we shall now proceed to show.

One of the earliest things done by the government of Mexico after throwing off the Spanish yoke, was to adopt the decree or law of the 18th of August, 1824, for the colonization of the public domain, and the regulations of 1828, authorized by that decree or law, for carrying it into effect. It cannot be denied, without ignoring the repeated decisions of this court, that the grant to Beaubien and Miranda was subject to the decree and regulations just mentioned, and, consequently, that it, in common with all grants of the public

domain of Mexico, not made to *empresarios* or contractors stipulating to introduce and colonize many families on the land granted as a consideration for the grant, was, when made, subject to the limitation imposed by the 12th article of the decree or law of the 18th of August, 1824, which is in these words: "It shall not be permitted to unite, in the same hands, with the right of property, more than one league square of land, suitable for irrigation, four square leagues in superficies, of arable land, without the facilities of irrigation, and six square leagues in superficies, of grazing land," making in all eleven square leagues as the maximum quantity that could be covered by a grant to any one person not an *empresario*. In *Van Reynegan* v. *Bolton*, 95 U. S. 33, which was an action of ejectment, based on a title derived from Mexico, the court says: "The grant is not set forth in the record; but we must presume that it was in the ordinary form of grants made by former governors of California, under the Mexican colonization law of 1824, *as under no other law were those governors empowered to make grants of the public domain.*" In *United States* v. *Vigil*, 13 Wall. 449–451, this court says: "*It has been repeatedly decided by this court, that the only laws in force in the territories of Mexico for the disposition of the public lands, with the exceptions of those relating to missions and towns, are the act of the Mexican Congress of* 1824 *and the regulations of* 1828." The same doctrine is laid down or recognized in the following cases: *Fremont* v. *United States*, 17 How. 542; *United States* v. *Cambuston*, 20 How. 59; *United States* v. *Workman*, 1 Wall. 745; *United States* v. *Jones*, 1 Wall. 766; *United States* v. *Hartnell*, 22 How. 286; *United States* v. *D'Aguirre*, 1 Wall. 311; *United States* v. *Pico*, 5 Wall. 536; *United States* v. *Vigil*, 13 Wall. 449; *Colorado County* v. *Commissioners*, 95 U. S. 259; *United States* v. *Valejo*, 1 Black, 541; *Hornsby* v. *United States*, 10 Wall. 224.

Turning now to the petition of Beaubien and Miranda asking for the grant, we find that, after indulging in certain general observations about the physical and moral development and improvement of the particular region wherein they desired to seat the solicited grant, they say: "Under the

above conviction we both request your excellency to be pleased to grant us a tract of land for the purpose of improving it, without injury to any third party, and raising sugar beets, which we believe will grow well and produce an abundant crop, and in time to establish manufactories of cotton and wool and raising stock of every description." They then go on to describe the locality of the solicited grant by reference to natural objects.

It is thus perfectly obvious, that this grant is one of the ordinary Mexican grants to colonists, and is marked by no feature to distinguish it in principle from the grants passed upon by this court in the cases above referred to or to take it out of the operation of the 12th article of the colonization act of 1824. The conclusion, then, is inevitable, that at the time of the conquest and cession it was not possible for Beaubien and Miranda to lay claim to more than eleven square leagues each, according to the land measure adopted by this court in the *United States* v. *Perot*, 98 U. S. 428, 430.

If, then, the grant has expanded to the gigantic proportions of the patent, it must have been because the United States has not only confirmed the grant as made by Mexico, but has enlarged it with a prodigal hand. It becomes necessary, then, to inquire whether anything has been done by the United State since the conquest and cession to warrant the contention that the grant has been enlarged as well as confirmed.

To remove all doubt as to land titles in New Mexico, claimed to be founded on Spanish or Mexican grants, Congress, by an act approved the 22d July, 1854, provided (§ 1) for the appointment of a surveyor general for that territory, and further provided (§ 8): That it shall be the duty of the surveyor general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands *under the laws, usages, and customs of Spain and Mexico;* and for this purpose may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. *He* shall make a full report *on all such claims as originated before the cession of the territory to the United States by the*

treaty of Guadalupe-Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of titles, with his decision as to the validity or invalidity of each of the same *under the laws, usages, and customs of the country before its cession to the United States*. . . . Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, *with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight, between the United States and Mexico.*

If anything is plain, it is that Congress intended to respect only such claims to land as should be valid "*under the laws, usages, and customs of Spain and Mexico;*" and that the power of the surveyor general to make inquisition into land titles should be limited to those "laws, usages, and customs," and that it should be his duty to report to Congress, through the Secretary of the Interior, his decisions as to the validity or invalidity of such titles, according to those "laws, usages, and customs." It is equally clear that Congress reserved to itself a revisory jurisdiction over the decisions of the surveyor general for "such action thereon as may be deemed just and proper, *with a view to confirm bona fide grants and give full effect to the treaty of eighteen hundred and forty-eight, between the United States and Mexico.*"

Congress having therefore limited its appellate function to the confirmation or rejection of grants, good or invalid, according to the "*laws, usages, and customs of the country*," and protected by the treaty of Guadalupe-Hidalgo, it may be safely said to be impossible to understand that Congress, in confirming a claim reported valid by the surveyor general, could have meant to do more than confirm the same as it existed at the time of the cession under "the laws, usages, and customs" then in force, it being to be conclusively presumed, in every case of this description, that Congress acted within the limitations imposed on itself by the 8th section of the act of 1854 (*supra*), and no language used by it, while avowedly exercising its revisory power over the decisions of the surveyor

general, can be held to import an intention to augment as well as confirm a Spanish or Mexican grant unless so explicit as to *compel* that sense. This brings us to a consideration of the proceedings, after the cession, looking to the confirmation of the grant to Beaubien and Miranda.

On the 23d of February, 1857, the claimants filed their petition in the office of the surveyor general, asking the confirmation of their grant. On the 17th of September, 1857, the surveyor general decided that the grant was "good and valid" "*according to the laws and usages of the Government of the Republic of Mexico and the decisions of the Supreme Court of the United States as well as the treaty of Guadalupe-Hidalgo, of February* 2, 1848," and confirmed the same to the grantees. This report was transmitted to the Secretary of the Interior with a letter dated 12th January, 1858.

These proceedings deserve attention in more than one particular. It will be observed that the petitioners, Beaubien and Miranda, state, in presenting their case, "*that said tract has never been surveyed, and they cannot, therefore, furnish any certain estimate of its contents.*" Plainly, then, the surveyor general had no *data* before him from which he could form an idea of the area embraced by the outboundaries given in the petition, and which were those established by the alcalde in delivering judicial possession. It is obvious, then, that the surveyor general, in confirming this grant as good and valid according to the laws and usages of Mexico and the decisions of this court, cannot be understood as sanctioning the grant to a greater extent than eleven leagues apiece to each of the grantees, which is all they could claim under the laws, usages, and decisions referred to and relied upon by the surveyor general. The decisions of this court, to which he refers, are undoubtedly those in the cases of *Arguello* v. *United States*, 18 How. 539; *United States* v. *Reading*, 18 How. 11, decided in 1855, and *Fremont* v. *United States*, 17 How. 542, decided in 1854. In which cases the Mexican law of 1824 and the regulations of 1828, pursuant thereto, are recognized as governing Mexican grants to colonists, like Beaubien and Miranda, at the time of the cession.

It was upon this presentation that the Beaubien and Miranda grant came before Congress for the action called for by the 8th section of the act of 1854. It was not until 1860 that Congress took the required action. By an act approved the 21st of June, in that year, entitled "An act to confirm certain private land claims in the Territory of New Mexico," this grant, with others was declared to be confirmed "*as recommended for confirmation by the surveyor general of that territory;*" that is to say, Congress confirmed it in so far as it had validity by the laws, usages, and decisions relied on by the surveyor general, who being, as we have seen, ignorant of the area comprehended within the outboundaries given in the petition and accompanying *expediente*, appealed to those laws, usages, and decisions as furnishing the limitations to which the grant was subject.

Now this is the whole foundation on which rests the claim to the principality covered by the patent. That every presumption is against the claim seems obvious. In the first place, Beaubien and Miranda were the beneficiaries of Mexico, and whatever consideration moved from them to Mexico as an inducement to the grant ceased to exist after the cession, when a new and a radically different plan for settling the country, by small homestead donations of one hundred and sixty acres to each grantee, was introduced by the new sovereignty.

Such grants as Beaubien and Miranda claimed were against the policy of the new government — a policy declared and established by the act of 1854 (*supra*), and it would seem improbable in the highest degree that Congress should have intended to go beyond its duty of confirming the grant as authorized at the cession, and to augment it by a vast additional concession, thus placing, with wanton prodigality, in the hands of two foreigners, a vast area that should have been left open to entry by our own people. It is quite safe to say that no Congress would have dared to do an act knowingly, which looked so much like belittling and undervaluing an acquisition for which our people had given their blood and treasure.

As confirmatory of this reasoning, to show the original extent of the grant, we would refer again for a moment to the *expediente*. It seems that proceedings under the original petition by Beaubien and Miranda had been suspended in consequence of certain representations which had been made to the authorities by one Martinez, a priest. In reply to, and refutation of, these representations Charles Beaubien, for himself and Miranda, filed a petition in which he states that the proposed grant to him and Miranda "*does not exceed fifteen or eighteen*" leagues, a declaration of great significance, as having been made at a time when there was no apparent motive for fraudulent exaggeration. And the facts that he locates the lands solicited at the place El Rincon del Rio Colorado, "including the Rayado and Poñil rivers, &c.," and that the governor general refers to the lands as the Rincon del Rio Colorado, coupled with the testimony before the surveyor general in support of the application for confirmation, show that the owners of the grant themselves looked upon the tract of country which could be readily irrigated from the rivers mentioned as the seat of the solicited grant, and nothing is better settled in proceedings of this character than that the grant must not exceed the limit stated in the petition applying for it, which is the foundation on which every step leading to the concession is based.

But supposing, in view of the array of facts and arguments above presented, that it is not clear that Congress intended to confirm the grant to Beaubien and Miranda and at the same time make them a large grant *de novo*, then the rule is that the doubt must be resolved in favor of the Government, as this court has repeatedly laid down.

In *Leavenworth, &c., Railroad Company* v. *United States*, 92 U. S. 733, 740, the court say: "If rights claimed under the Government be set up against it, they must be so clearly defined that there *can be no question of the purpose of Congress to confer them.* In other words, *what is not given expressly or by necessary implication, is withheld.*" In *Slidell* v. *Grandjean*, 111 U. S. 412, 437, the court say: "It is also a familiar rule of construction, that where a statute operates as a grant

of public property to an individual or the relinquishment of a public interest *and there is a doubt as to the meaning of its terms or as to its general purpose, that construction should be adopted which will support the claim of the Government rather than that of the individual. Nothing can be inferred against the state.*" And in *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, 88, it is laid down, with reference to a land grant, that "all grants of this description are strictly construed *against* the grantees; *nothing passes but what is conveyed in clear and explicit language.*" And this is the doctrine declared in the great cases of *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, *Providence Bank* v. *Billings*, 4 Pet. 514, and *Jackson* v. *Lamphire*, 3 Pet. 289.

If the question involved were whether the United States had exempted the land in controversy from taxation, and the argument in support of the pretension were no stronger than the argument relied on to sustain the claim to more than twenty-two square leagues of land, the decision would be against the exemption set up, inevitably, for the want of a sufficiently clear indication of purpose to grant it; and yet the two cases are identical in principle, for how can a distinction be drawn between surrendering the power through which the property of Government is obtained, and giving away the property itself? And why should not the presumption in favor of the Government be stronger, if anything, in the case of a pure donation, like the case in hand, than in the case of a contract containing a consideration to support the claimed immunity from taxation?

Now it would seem impossible that the candid inquirer would be able to find in this case anything to *compel* the conclusion that Congress intended to withdraw from entry by our own people an immense area of valuable land not covered by any grant, *merely for the aggrandizement of two foreigners who had no claims whatever on the United States* further than to be protected in their persons and property.

In arriving at the intention of Congress in the confirmatory act of the 21st June, 1860 (*supra*), it is important to keep in mind that the great majority of grants made by Mexico that

have come under judicial or congressional review since the cession were made without any previous survey whatever, and with no other guide as to locality than such references to conspicuous natural objects as occurred to the unlettered pioneers as sufficient to indicate the particular parts of the country out of which they wished the grants solicited by them to be carved when surveys could be made.

The observations of Mr. Justice Miller in *Rodrigues* v. *United States*, 1 Wall. 582, 587, 588, descriptive of Mexican grants in California, are equally true of grants by the same authority in New Mexico. He says: "Some idea of the difficulties which surround these cases may be obtained by recurring to the loose and indefinite manner in which the Mexican government made the grants which we are now required judicially to locate. That government attached no value to the land, and granted it in what to us appears magnificent quantities. Leagues instead of acres were their units of measurement, and when an application was made to the government for a grant, which was always a gratuity, the only question was whether the locality asked for was vacant and was public property. When the grant was made, no surveyor sighted a compass or stretched a chain. Indeed, these instruments were probably not to be had in that region.

"A sketch called a diseño, which was rather a map than a plat of the land, was prepared by the applicant. It gave, in a rude and imperfect manner, the shape and general outline of the land desired, with some of the more prominent natural objects noted on it, and a reference to the adjoining tracts owned by individuals, if there were any, or to such other objects as were supposed to constitute the boundaries. Their ideas of the relation of the points of the compass to the objects on the map were very inaccurate; and as these sketches were made by uneducated herdsmen of cattle, it is easy to imagine how imperfect they were. Yet they are now often the most satisfactory and sometimes the only evidence by which to locate these claims." Observations of substantially the same character were made by the House Committee on Private Land Claims, with reference to land claims in New Mexico, communicated to Con-

gress for confirmation, in their report recommending the passage of the bill which soon became the act of 21st June, 1860.

Knowing then, as Congress did undoubtedly, that there was no way of ascertaining the areas of a majority of these grants without surveys, and that the rude descriptions usually accompanying applications to the Mexican authorities for grants of land did not pretend to be more than indications of the particular regions where the applicants desired their grants to be located, it seems in the highest degree unreasonable to say that Congress, by confirming such grants, intended that the confirmation should be commensurate with these exaggerated and proverbially inaccurate descriptions. Congress knew it could work no prejudice to the public good to confirm these grants as reported, because what they lacked in definiteness of description was supplied by the Mexican law forbidding more than eleven square leagues to come into the hands of any one person, not an *empresario*. Congress was well aware that, when the necessary surveys were made, by government authority, all uncertainty would be rendered certain, and that all lands in excess of what could be lawfully held would at once fall into the public domain and be thrown open to entry by our own people. The Supreme Court in Fremont's case, and other cases, had settled the validity of grants of this description, and seeing that great delays had already occurred through the nonaction of Congress, and that uncertainty about titles in New Mexico was extremely unfavorable to the settlement and development of the country, Congress determined, as was its duty under the treaty of peace and cession, to confirm these grants in their then condition, without waiting for surveys.

Now the position taken by the Government is met by the defendant, the Maxwell Land-Grant Company, not so much by an attempt to refute the reasoning by which that position is supported as by an appeal to the decision of this court in the case of *Tameling* v. *United States Freehold Company*, 93 U. S. 644. That case involved a portion of the *Sangre de Cristo* grant, which was confirmed by the same act of Con-

gress as confirmed the Beaubien and Miranda grant, and as the *Sangre de Cristo* grant had its own peculiar and distinguishing facts, it is apparent that before the case relied on can be held to control the case at bar, it must be shown that the two grants as reported to Congress were alike in every material particular, for it will be observed that the decision in the Tameling case turns upon the intention of Congress in confirming the grant "*as recommended for confirmation by the surveyor general*," words of qualification which are applied by Congress to all the grants confirmed at the same time, and, therefore, the terms of recommendation, used by the surveyor general, with reference to each grant confirmed, formed as much a part of the law as if they had been recited in it.

The grant in the Tameling case belonged to the same description of grants as the grant now in question, and was at the time of the conquest and cession governed by the law of 1824, and, we have no doubt, would have been confined within the limit of that law as to quantity but for the extraordinary way in which the surveyor general recommended it to Congress for confirmation. Referring to the act of judicial possession, the surveyor general says, "the justice of the peace, José Miguel Sanchez, placed the parties in possession of the land, *with the boundaries contained in the petition, vesting in them, their children and successors, a title in fee to said lands.*" He then goes on, with remarkable ignorance of the subject and the decisions of this court, and attributes the most extraordinary powers over the public lands to the Mexican departmental governors. He says: "The supreme authorities of the remote province of New Spain, afterwards the Republic of Mexico, exercised from time immemorial certain prerogatives and powers, which, although not positively sanctioned by Congressional enactments, were universally conceded by the Spanish and Mexican governments; and there being no evidence that these prerogatives and powers were revoked or repealed by the supreme authorities, it is to be presumed that the exercise of them was lawful. The subordinate authorities of the provinces implicitly obeyed these orders of the governors, which were continued for so long a period until they became the uni-

versal custom, or unwritten law of the land wherein they did not conflict with any subsequent Congressional enactment. Such is the principle sanctioned by the Supreme Court of the United States, as expressed in the case of *Fremont* v. *The United States*, 17 How. 542, which decision now governs all cases of a similar nature." He then concludes by declaring "*that a legal title vests in Charles Beaubien to the land embraced within the limits contained in the petition.*"

Now, it would seem reasonable that the confirmation of the *Sangre de Cristo* grant "*as recommended*" should have been held to carry the title to the whole tract, the confirmatory law operating as a patent, and, like a patent, being open to correction in a direct proceeding for that purpose. To be sure it would have been more satisfactory, perhaps, if the court had said more, with a view to repelling the idea that the language used in the act of confirmation was not strong enough to *compel* the conclusion that Congress, without any apparent reason, had determined to depart from the line of proceeding it had chalked out for itself in the act of 1854 (*supra*) merely for the purpose of aggrandizing a foreigner at the expense of our own people.

That Congress was misled by the surveyor general's statement that the Sangre de Cristo grantee had both seisin and title up to the outboundaries given in the petition would seem clear from its action upon the Scolley claim, and upon the Vigil and St. Vrain claim, which latter being discovered to be for a quantity of land largely in excess of what was allowed by the law of 1824, was cut down to the maximum permitted by that law, notwithstanding the surveyor general's repetition in that case of the gross errors of law contained in his Sangre de Cristo report about the powers of Mexican governors, which Congress, with a full knowledge of the decisions of this court, seems to have treated as unworthy of notice.

Turning now to the report of the surveyor general on the Beaubien and Miranda claim, we find his recommendation to Congress essentially different from that made by him in his Sangre de Cristo report. In place of giving boundaries and deciding that the claimants had seisin and title clean up to those bound-

aries, he does as he should have done in the Sangre de Cristo and like cases recommended by him, that is to say, he decides that the grant is good and valid "*according to the laws and customs of the Government of the Republic of Mexico and the decisions of the Supreme Court of the United States, as well as the treaty of Guadalupe-Hidalgo of February* 2, 1848, *and is therefore confirmed to Charles Beaubien and Guadalupe Miranda, and is transmitted for the action of Congress in the premises.*" It is *as thus recommended* that the Beaubien and Miranda grant was confirmed by Congress, and if there is any similarity between the confirmation thus made and the confirmation in the Tameling case, we have failed to discover it. But, after all, the decision in the Tameling case ends with that case, as it is hardly probable that another case just like it will arise again.

To show how inadequate was the consideration given by Congress to these Mexican claims, and that in disposing of almost every case from New Mexico Congress was content to follow the lead of the surveyor general, who was no lawyer, we refer again to the succinct report of the House Committee on Private Land Claims, made at the 1st session of the 36th Congress, already referred to more than once; and we respectfully submit that these considerations with reference to the way in which Congress passed on Mexican land claims should be allowed to have great weight with the court in construing the confirmatory act of 1860.

If the above reasoning is sound, it follows inevitably that the patent in question is void because embracing a large extent of country which the Executive Department had no power to dispose of in that way. This court has again and again held that the defence of purchaser *bona fide* is no answer to a bill filed to cancel a patent for want of authority in the land office to issue it, and that, like the judgment of a court proceeding without jurisdiction, it can be assailed on that ground whenever and wherever relied on. It is unnecessary to cite authority on a point so well established.

Whether, then, the excess in the patent be determined by the limit of the Mexican law of 1824, or by the outboundaries

named in the original petition for the grant, the action of the land office as to such excess was unauthorized, and the patent, being an entirety, thereby rendered void *in toto*. But in the case at bar, as has been fully shown by the brief of the United States special attorney [*post*], we have, in addition to want of authority, instances of fraud and misrepresentation, used for the purpose of enlarging the outboundaries of the grant to Beaubien and Miranda, of which the defendant, the Maxwell Land-Grant Company, had notice, as we contend.

It was intimated in the court below by the counsel for the defendant that the grant to Beaubien and Miranda was an *empresario*, but this was manifestly a mere afterthought, for there is not a syllable in the record to countenance any such idea. From the beginning the grant has been treated by the parties interested as an ordinary grant to individuals for their own use. To make the grant valid as an *empresario* the approval of the supreme government was necessary, but the approval obtained was that of the departmental assembly, which was only sufficient to perfect the ordinary colonization grant.

In the protracted and earnest discussion of this claim before the Department of the Interior, it was not hinted that the grant was an *empresario*, so far as the record shows; an omission which is inexplicable if it had been supposed there was a pretext for advancing such a claim. Evidently the court below attached no importance to the point, for it does not notice it in its opinion.

In conclusion we would call attention to the point made in the brief of the special counsel [*post*], that there was no jurisdiction in the land office to order the Elkins and Marmon survey, the decision of Mr. Secretary Cox, on this very grant, that *it must be restricted to twenty-two square leagues*, being then in full force.

It is respectfully submitted that the decree should be reversed.

Mr. J. A. Bentley, special counsel for the United States, in addition to arguing the points maintained by *Mr. Maury*, contended as follows:

The outboundaries. The eastern and northern lines of the patented lands lie several miles outside of the corresponding outboundary lines of the confirmed grant and include several hundred thousand acres of the public domain outside the true outboundaries of the grant on the east and north, which the land officers had no authority, for the purpose of the grant, to include in the patent.

(1) The outboundary lines specified by Surveyor General Pelham in his report of the grant for confirmation are to be followed in locating the outboundary lines upon the ground. After what was said by this court in the *Tameling Case*, as to the office and force of the report of the surveyor general, argument of counsel will be powerless to shake the proposition that the confirmed report has all the force of law; it was incorporated into the act of confirmation for the purposes of the grant, to settle its object, its locality, and its extent.

After distinguishing the plan adopted by Congress for the investigation of the Mexican grants in California by procedure essentially judicial in character, from that adopted for the New Mexico grants by the political branch of the government, through inquiries by the surveyor general, reserving final action to Congress, the court say: "Such action (the final action by Congress confirming the grant) is of course conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general or his decision declaring the validity of the grant." The description, therefore, recited by the surveyor general to identify the grant petition, he having referred to no other description by which the grant was to be located, is the governing description in the location of the outboundary lines upon the ground, and will prevail over the description of the alcalde in the act of possession if they are found to disagree with each other.

The conflict, however, which the Commissioner of the General Land Office supposed existed, but did not describe, between the description in surveyor general Pelham's report

and that of the alcalde's certificate of possession, does not in fact exist. The description adopted by the surveyor general is substantially the same as that employed by Beaubien and Miranda in petitioning for the grant. A comparison of the descriptions of the petition for the grant, of the alcalde's juridical possession certificate, and of the surveyor general's report will set at rest the question of conflict.

In order to test, if not to contradict the official translation of the description in the petition for the grant, the defendant called Rafael Romero, an expert in the translation of the Mexican-Spanish into English. From a comparison of all these documents it is seen that the outboundaries of the grant as described in the petition are substantially the same as the description in the surveyor general's report, and both are in agreement with the translation produced by the defendant's expert, Romero; while the alcalde's certificate in terms adopts the description in the petition with the plat as correct, and certifies that the two are in conformity with each other and with the certificate, as to the identity of the land referred to. There can be, therefore, no conflict between the description of the outboundaries of the grant as given by the surveyor general, by Beaubien and Miranda in their petition for the grant, and by the alcalde in his certificate of the act of possession. All that can be said is, that the alcalde adopted the natural object boundary calls of the petition, but added some artificial calls consisting of stone mounds in entire consistency with the natural objects.

The eastern outboundary line of the grant as designated by the alcalde, and as designated by the surveyor general, is, then, tied to the natural objects mentioned in the petition for the grant, and the same is also true in respect to the northern outboundary line, that is to say, the eastern line commencing below the junction of the Raydo (now Cimarron) with Red River at the first hills east of Red River, follows northerly along the first hills east of and along Red River to opposite the junction with Red River of a stream called Una de Gato River, flowing south out of the table-lands which constitute the northern boundary, and continuing, follows the first hills

east of the Una de Gato to the summit of the table-land, and the northern line follows along said summit northwesterly to the top of the mountain which divides the waters of the rivers running to the east from those running towards the west.

The plat of the alcalde purports to lay down the relative positions, upon the ground, of the natural objects in the outboundary lines of the grant, and the places of his stone mounds in relation to these natural objects, and of the principal streams of water within these lines, including the Colorado River and its affluents, the Rayado and its affluents, and the Vermijo. The Colorado is represented as making a bend, forming an angle a little greater than a right angle, at the junction of the Una de Gato, and as having a general course below the said junction through the grant, not less than 15 degrees east of south. The Una de Gato is represented as a stream flowing south out of the table-land and emptying into the Colorado at the upper end of the bend. The table-land is represented as commencing on the west near to the Sierra Madre and falling off a little to the south of east, extending beyond the head of the Una de Gato, and named upon the plat as "table-land of the Chicorica or Chacuaco," and the first hills east of the Colorado and the Una de Gato are shown as a continuous line from the southeast to the northeast corner of the grant, following along the course of the two streams in an unbroken northerly direction to the table-land.

The natural objects upon the western and southern outboundaries are as specifically marked upon the plat, but the recital of their detail is not necessary for the purpose of this argument.

The alcalde's certificate states that in the execution of the act of possession he *erected seven* mounds on the outboundaries of the grant. Mound No. 1 on the east side the Red (Colorado) River. Mound No. 2 in an easterly direction in the first hills east of the river. Mound No. 3 on the north side of the Chicorica or Chacuaco table-land. Mound No. 4 on the summit of the mountain. Mound No. 5 on the Cuesta del Osha, 100 varas north of the road from Fernandez to

Laguna Negra. Mound No. 6 on the eastern point of the Gonzalitos table-lands and Mound No. 7 on the west side of the Red (Colorado) River opposite to the first mound. The plat certified to be correct by the alcalde, as before shown, shows that the relative positions of all these mounds, but particularly of the first four, correspond with the natural objects described in the report of the surveyor general, and shows that the third mound was placed upon the table-land near the head and to the east of the Una de Gato in a line with the first hills east of the Colorado, extended northerly along the first hills east of the Una de Gato, and the fourth mound on the Sierra Madre in a line with the general course of the table-lands called by the alcalde Chicorica, or Chacuaco.

If the plat can be depended upon as a generally correct outline of the country it purports to represent, explained by the petition for the grant and the alcalde's certificate, there ought to be little difficulty in locating upon the ground, the eastern and northern outboundaries of the grant as confirmed.

The government insists that the plat is a correct general outline of the country. The defendant denies that it is so, and claims that it is radically incorrect in the representation of the Una de Gato River and in the location of the third mound, asserting that the Una de Gato River referred to by the alcalde is a stream having its source some eighteen miles almost directly east of the bend in the Colorado, and forming a junction with that river more than eight miles below the bend, and that the alcalde's third mound was erected upon the northwest point of what is now known as San Francisco mesa, twelve miles to the northwest of the head of the stream claimed by the defendant as the Una de Gato.

The government contends, on the other hand, that the stream now called Dillon's Cañon is the Una de Gato of Beaubien and Miranda and of the alcalde, and necessarily also of Surveyor General Pelham; that the Raton Mountains, dividing the waters flowing into the Colorado from those flowing into the Las Animas is the table-land forming the northern boundary of the grant; and that the third mound was erected on said table-land at the head of the Una de

Gato (now Dillon's Cañon), and east rather than northwest of the stream. Nearly the whole of the oral testimony and much of the documentary evidence bears pro or con upon these opposing claims, and the establishment of the government's contention upon this question will necessarily be fatal to the defendants' case.

(2) *Raton Mountain Mesa.* The summit of Raton Mountains, extending from the Sierra Madre in a general course a little south of east to the Raton pass, is the "table-land" of Surveyor General Pelham's report, and also of the "Chicorica or Chacuaco" of the alcalde's certificate; and the stream, in nature flowing down from the Raton Mountains and forming a junction with the Colorado or Red River, at the bend, now known as Dillon's Cañon, is the Una de Gato of the alcalde, as well as of Surveyor General Pelham.

While the word "mesa" employed in the proceedings of Mexico to describe the contour of the earth's surface along the northern outboundary of the grant and translated into English "table-land," suggests to the American uplifted flat lands having precipitous edges like the formation to the east of Raton pass, it is the term used by the Mexicans to denote flat lands at the top of hills and mountains without regard to whether the edges are precipitous or sloping.

The summit of Raton Mountains west of Raton pass to the Sierra Madre is "mesa" within the significance of that term as used by the Mexicans.

There is no ground, except the summit of Raton Mountains south of the Arkansas River, the contour of which answers to that designated by the Mexican authorities and by Surveyor General Pelham as the northern line of the grant, *i.e.*, which presents a "mesa" or table-land formation from which the drainage flows south into Red River *above the bend*, and extending out to the eastward from the Sierra Madre far enough to cover the river until it turns to the south.

The defendants maintain that, notwithstanding the correspondence of the topography of the Raton Mountains with the ground called for along the northern outboundary, and notwithstanding the fact that there cannot be found any other

ground which will answer the call for that line, still, the mountains west of Raton pass are not the ground intended by the authorities of Mexico as the northern outboundary of the grant, because that locality is not known as "Chicorica or Chacuaco mesa," and there is a Chicorica mesa east of the pass where defendants claims the alcalde erected the third mound.

Appellant says in response, that the alcalde's description of the eastern and northern lines of the grant has been shown to be essentially identical with the description in the petition for the grant and the plat, and also with the description contained in the surveyor general's report. The alcalde has simply applied the name of "Chicorica or Chacuaco mesa" to the table-land along the north line, which is not given a name either by the petitioners for the grant or by the surveyor general. The alcalde's certificate of possession declares, "*We proceeded to erect the mounds according as the land is described in the accompanying petition, and which corresponds with the plat to which I attach my rubric.*"

Two years before the alcalde set up the mounds, the petitioners for the grant identified the north line by describing the contour of the earth along where it ran, making reference to no local name to aid identification. This would have scarcely occurred if a distinguishing name generally known had at that time been associated with the place.

The form of expression used by the alcalde, "Chicorica or Chacuaco mesa," indicates that the alcalde was uncertain which, if either, name belonged to the place he had in mind, or that the two names were applied to the place interchangeably. These words have not the same significance, and, except their use by the alcalde in the plat and certificate of possession, and their employment by Griffin upon his fraudulent plat of 1870, to simulate the alcalde's application of the names, I think no instance can be found where the words have been used in a manner to leave room for inference, even, that they were, or might properly be applied to the same place.

It will be borne in mind that at the time of the grant proceedings, and for several years later, the country in question

was not inhabited by civilized men. Jones says that as late as 1846, 1847, and 1848, it was inhabited by "Indians, wild horses and buffalo;" and Silva says that when he first became acquainted with the country there were no civilized people from the Sierra Madre to Bent's Fort on the Arkansas.

The limited vocabulary of the Indians, and the necessarily imperfect understanding of the Indian languages by the early hunters, travellers and traders, together with the gradual application of names to localities and objects in nature which before had been unnamed or included in some general Indian name not fully understood, incident to the occupation of the country by the Mexicans and Americans, will largely, if not altogether, account for the uncertainty and inconsistencies apparent in the testimony of the witnesses who testify at this late day in regard to the names in the country in question, and suggest an explanation of how the alcalde came to apply the names Chicorica or Chacuaco to the table-land west of the Raton pass. A brief analysis of the testimony of some of the more important of these witnesses upon this point will show the situation with sufficient clearness.

It shows that there was a country in the Raton Mountains including some, if not all the high mesas east and southeast of Raton pass, to which the Indians previous to their migration applied the name Chicorica; that those most familiar with the Indians did not gather from them the same idea of its locality and extent, and it may very well be supposed that the alcalde living at Taos thought the names Chicorica and Chacuaco were properly applicable to the whole Raton range of table-lands whether east or west of Raton pass.

The Una de Gato River. The claim that the branch of the Chicorica, running out from the south side of San Isedro and Una de Gato mesas, is the Una de Gato of the grant, rests upon the evidence showing that from a date several years later than the grant down to the present time, that stream has been called Una de Gato, and the testimony of witnesses Silva and Wooton that they knew it by that name before the grant.

It has already been noted that the country was occupied by Indians until several years subsequent to the grant. Now, Una de Gato is the name given by the Mexicans to the black locust, on account of the resemblance of its thorns to cat's claws, and it is alleged it was applied to *this* stream because the locusts grew along its banks; but it cannot be assumed that because Silva, Wooton, and perhaps other hunters were familiar with this insignificant stream before the occupation of the country by the Mexican people and called it Una de Gato its existence was known to the people of Taos or other Mexican towns. If it had been a large stream, an important object in nature, or upon a route of travel, that presumption might perhaps have been indulged, but it was neither; it is simply one of the branches of a larger stream lying entirely out of the way of the routes of travel in the days of the grant. Nor does the fact that the petitioners for the grant and the alcalde mentioned a Una de Gato River as one of the natural objects of description argue very strongly for the defendants' Una de Gato when it is remembered that the black locust abounds on all the mountain streams in that country.

Besides this, the neighborhood furnishes several examples of two or more streams and places called by the same name. There is the Trinchera, a branch of the Las Animas and also a branch of the Rio Grande; the Ute, a branch of the Red, also of the Cimarron and of the Sangre de Cristo; the Willow, a branch of the Cimarron and of the Chicorica. There are also two branches of the Las Animas called San Francisco, and two towns within the Vigil and St. Vrain grant called La Junta. Nor will the circumstance that the name of the stream claimed by the government as the Una de Gato is now known by another name add to the strength of the defendants' claim. Ahogadere mesa has become San Francisco, and the lower waters of the Rayado have now become the Cimarron.

But space need not be consumed in illustrating how the alcalde may have applied the name Una de Gato to what is now Dillon's Cañon, nor how that name may have given place to the name by which it is now known. History is full of

accounts of the process of displacement of savage races by civilization, showing the gradual change of name, one for another, to designate objects in nature, and the application of names to places before unnamed as settlement progressed and the particular knowledge of the geography of the country advanced. This is certain, the name Una de Gato was not applied to the stream by the Indians, but by Mexicans, and therefore it may be assumed to be a name of comparatively late date, and as we hope to satisfy the court that neither Silva nor Wooton, whose testimony alone dates the name of this stream as Una de Gato earlier than the grant, are to be believed in any point in support of the defendants' claim unless they are themselves corroborated by reliable witnesses, we say without hesitation that the testimony does not name the stream Una de Gato until several years later than the grant, 1848 or 1849, when Jones testifies that he knew it by that name; or possibly it might be inferred from Bransford's testimony that the name had been given it as early as 1846.

The Una de Gato Creek does not answer the description of the Una de Gato of the grant. It does not form a junction with Red River, but is simply a branch of the more important stream, Chicorica, emptying into the latter four and a half miles above the junction with the Red, which stream joins the Red more than nine miles below the bend, where the Una de Gato of the grant is represented by the alcalde to form a junction with it; and besides it comes into the Chicorica from an easterly direction, and not from the northerly, as the course of the Una de Gato is represented by the alcalde. The claim of the defendants that Una de Gato Creek is the Una de Gato of the grant is as absurd a geographical proposition as the declaration that the Platte, a tributary of the Missouri at Omaha, or the Tennessee, a tributary of the Ohio at Paducah, are tributaries of the Mississippi at St. Louis and Cairo, respectively, would be.

Elkins and Marmon's field notes in their 36th, 37th and 39th mile on east line, show that the Chicorica stream is a considerable stream, carrying "plenty of fine water." It is impossible to believe that the alcalde in delineating this grant

upon the plat called the Chicorica below the junction of the Una de Gato, a mere branch, by the name of the branch. Such a designation would have been the introduction into the geography of the grant, of a rule of nomenclature of streams wholly at variance with the universal usage of mankind, in their designation by name — that of absorbing the branches into the principal streams at their junction.

The presumption of the general correctness of the alcalde's plat in delineating the territory of the grant, and the natural objects referred to by him in their relation to each other, cannot, owing to its official and solemn character, be overcome by slight or uncertain evidence in respect to the *names* of objects otherwise described; and if objects in nature are found in general correspondence to the plat, they will be adopted as the objects referred to by him in disregard of the names which he may have applied to them, unless other objects in nature bearing the names used, are found which equally well answer his description. *Names* used to designate objects in nature, introduced into descriptions of lands, give way to descriptions of localities by contour of the ground intended, if the same are definite enough to secure identification without reference to the names. If the names used are inconsistent with the rest of the description, or tend to make uncertain what otherwise would be certain, they will be treated as surplusage.

Outside of the presumption of the general correctness of the plat in its delineation of the ground, it carries evidence on its face that it truthfully shows the relations, one to another, of the principal natural objects laid down upon it as far as they were known to the alcalde.

Recurring again to the fact that the country, down to the date of the grant and several years later, was unoccupied by civilized inhabitants, but occupied by the Indians alone, except upon the routes of travel, it may now be added that along such routes, the country was more or less known to the civilized people of the neighborhood and to travellers. Besides the prominent features of the land, like the Sierra Madre and Raton Ranges and isolated mountains like Eagle Tail,

which could be seen from a distance, the topography was quite particularly known along the travelled route from Bent's Fort on the Arkansas towards Santa Fé and Taos, over Raton pass, via Stockton (Clifton) crossing of Red River and Rayado, and along the old Fort Leavenworth route, crossing Red River at Rocky Ford below the junction of the Rayado (Cimarron).

Comparatively correct information may therefore be attributed to both the petitioners for the grant and the alcalde in respect to the topography in the immediate vicinity of those routes of travel, and they may be supposed to have known the general course of Red River at these crossings, and also of the drainage courses from the Raton divide in the neighborhood of the route over Raton pass; while neither can be presumed, at that day, to have had any particular knowledge of the geography and topography of the country at any considerable distance away from either route.

What do we find upon the plat?

(1) That the general course of Red River in the immediate vicinity of the crossings is correctly laid down from northwesterly to southeasterly, while the variable courses of the river, as it exists in nature, between the crossings for a distance of thirty miles, about which no particular knowledge is supposable, is incorrectly assumed to be the same as at the crossings.

(2) That the great bend in the river a mile or more above the Stockton crossing, in near proximity to which the Raton route lay, is correctly set down.

(3) That a drainage stream from the Raton divide having its course from the divide southward and emptying into the river at the bend, along which that route follows for more than two miles above the junction, and from there to the top of the divide, a distance of seven miles, passes along a little to the east of it, is correctly delineated and named by the alcalde Rio del Una de Gato.

(4) That the watercourses of the grant on the Raton route from Stockton crossing to the Rayado are laid down with their names as then known with comparative exactness.

(5) That the mesa Rayado and Gonzalitos on the southern

boundary, in view from both the Raton and Leavenworth routes, are represented with comparative truth.

(6) That the headwaters of the Rio Fernandez, embracing the southwest corner of the grant as in nature, are correctly laid down.

(7) That three prominent peaks in the Sierra Madre, on the western boundary, to wit, Boundary peak, Costilla and Baldy, or perhaps Taos peaks, are correctly noted at the headwaters of the streams of the grant shown on the plat, although unnamed by the alcalde.

(8) That the foot-hills along the Sierra Madre and Raton ranges are delineated by properly waved lines with a comparatively proper trend as they exist in nature, as is also the line of the first hills east of Red River to the summit of Raton divide.

(9) That the northern line of the grant, upon the top of the watershed from which the waters flow south into Red River above the bend, is correctly noted by proper lines denoting the watercourses from the northern boundary to the Red River.

It is true that some of these objects, perhaps most of them, are to some extent out of place as they exist in nature, as might be expected would be the case with a plat drawn without scale and without actual measurement under a compass and chain, but their relations to each other as laid down are so truthful to nature that their identification cannot well be mistaken, and show beyond a doubt that it was faithfully drawn to represent as truthfully as might be what was matter of knowledge as well as what was matter of estimation and judgment. So truthful, indeed, that the principal error in the course of Red River between the crossings on the Raton and Leavenworth routes, resulting in a plat showing the bend in Red River to be a considerable distance to the westward of the Leavenworth crossing, when in nature it is almost directly to the north of it, and the course of the river between the crossings the same as at the crossings, shows that in making his plat the alcalde faithfully adhered to the knowledge he possessed and filled up the intervening spaces upon his judg-

ment, informed by that knowledge, and adds to, rather than detracts from the authority of the plat whenever it represents objects which were known at the time.

Inasmuch, therefore, as the stream now called Dillon's Cañon — a name evidently later than the grant proceedings — and from its location near the route of travel over Raton pass, between the Arkansas and Taos and other settlements in New Mexico, presumably known to the alcalde, corresponds in the place of its source, its course to and place of junction with Red River, with the stream marked upon the alcalde's plat and named by him Rio del Una de Gato, and neither the Una de Gato Creek, now claimed by the defendants, nor any other stream in the country, does so correspond, Dillon's Cañon, whether rightfully or wrongfully named Una de Gato by the alcalde and by whatever name it may have since been known, is the Una de Gato of the grant.

But other circumstances confirm this conclusion. According to the plat the third mound of the alcalde was erected upon the summit of the divide between the waters flowing south into Red River above the bend, in a line parallel with the general course of Red River below the bend extended, and near the head of the stream named by him Una de Gato, but on the *east* side of it. If Una de Gato Creek now claimed, be assumed as the Una de Gato of the grant, the place of the third mound as claimed by the defendants is more than six miles north, and more than seven miles west of the extreme headwaters of the Una de Gato and entirely out of correspondence with the representations of the alcalde's plat and of his certificate of possession.

Another matter of great significance is, in that country the water fall is so light that the lands are incapable of producing crops without artificial irrigation, and when inaccessible to the streams of water, of little value for grazing purposes; therefore, the natural water courses were regarded as of the utmost importance to the enjoyment of the lands, and a principal feature everywhere. It will be observed that the plat is drawn to exclude from the eastern outboundaries of the grant all lands east of Red River watered by streams

which flow into it south of the bend, and to *include* the lands watered by the streams flowing into it from the west, above the Leavenworth crossing, and from the south slope of the divide drained by the river above the bend. Now, the Chicorica is a considerable stream, and with its various branches waters a large tract of country immediately adjacent to the Raton route and joins Red River a few miles below Stockton crossing. Owing to its command of a large tract of country in plain view of the Raton route, and the fact that it also lay in the route of the Indian traders, buffalo hunters, and travellers from Stockton crossing via Manca de la Burra pass to the plains beyond, its existence and location must have been known to the petitioners for the grant and to the alcalde, and if it had been intended to include those lands within the outboundaries of the grant, the purpose would have been indicated by incorporating the stream into the plat.

It is certain that the particularity and correctness of detail just pointed out, which characterizes the plat, would not have omitted to note the Chicorica with equal correctness, as a tributary of Red River, joining it on the *east* and below the bend, so as to carry the land embraced by its waters, if that had been the intention of the petitioners and of the alcalde.

Third Mound. The third mound was not erected by the alcalde upon the northwest extremity of San Francisco mesa. For the purposes of this case the alcalde's certificate of possession, reciting his proceedings and the date and order thereof, is conclusive upon the defendant and the government alike. The statement that he commenced on the east of Red River and erected a mound, and went to the first hills east of the river and erected another mound, and proceeded thence from south to north on a line nearly parallel with Red River and erected a third mound, &c.; and the seventh and last mound on the west side of Red River opposite the first, all which was done between the 13th day of February, 1843, when the alcalde recorded his decree to proceed to put the petitioners in possession, and the 22d of the same month, the date of the certificate *is verity, and not the subject of contra-*

diction, for the reason that the certificate was incorporated into the report of the surveyor general, and thence into the act of Congress confirming the grant.

The claim that the third mound was erected on the northwestern extremity of San Francisco mesa rests wholly upon the testimony of the witnesses Silva and Wooton that they saw the alcalde place a mound there, and that the fourth mound was erected on a certain high peak of the Sierra Madre, sixteen miles to the north of the 37th parallel, upon the testimony of Silva alone.

A careful analysis of their testimony shows that these witnesses are unworthy of belief, and the position of the government that the plat of the alcalde sets down his stone mounds and the natural object of the outboundaries in their true positions as related to each other, stands unshaken.

The claim of the government that the northern outboundary line of the grant is along the top of the Raton Mountains, is supported by the nearly contemporaneous grant made to Cornelio Vigil and Ceran St. Vrain, popularly known as the Las Animas grant, the southern boundary of which is upon the northern boundary of the grant in question. An examination of the plat, although a very rude one, and far from correct as the ground is now known, and containing errors, which, without particular knowledge of the topography, tend to mislead, shows clearly enough that the southern boundary was intended to correspond with the northern boundary of the Beaubien and Miranda grant, and to be upon a divide from which the waters flow northward into the Arkansas, and that it was intended to include within the boundaries of the grant, the lands embraced by the waters of the Las Animas, Huerfaro, and Apishapa rivers.

Mr. Bentley also argued at some length that frauds were practised upon the government, by means of which "the patent was made to include several hundred thousand acres outside the true boundaries on the east and north," herein discussing the maps in the case; also that the decision of Secretary Cox in December, 1869, was so far final as to debar

subordinates from subsequently reopening it; and, further, that the defendant was not a *bona fide* purchaser for value after issue of the patent. It is not practicable to report his contentions on these points as fully as his arguments on the other points above reported.

Mr. Frank Springer and *Mr. Charles E. Gast* for appellees.

Mr. Justice Miller delivered the opinion of the court.

The case was an appeal from the Circuit Court of the United States for the District of Colorado.

The decree from which this appeal is taken dismissed a bill brought in that court by the United States against the Maxwell Land-Grant Company, the Denver and Rio Grande Railway Company, the Pueblo and Arkansas Valley Railroad Company, and the Atchison, Topeka and Santa Fé Railroad Company. It was brought by the Attorney General of the United States, and its purpose was to have a decree setting aside and declaring void a patent from the United States granting to Charles Beaubien and Guadalupe Miranda, their heirs and assigns, a tract of land described in a very extensive survey, which is made a part of the patent. It is stated in the brief of the Assistant Attorney General in this court that the patent conveys $1{,}714{,}764\frac{94}{100}$ acres of land, lying partly in the territory of New Mexico and partly in the state of Colorado. This patent is dated May 19, 1879, and seems to be regular on its face in every particular. The bill to set this patent aside was filed in the Colorado Circuit Court on August 25, 1882, which was a little over three years after the patent was issued. By virtue of certain mesne conveyances, and other transactions not necessary to be recited here, it may be stated that the title conveyed by the patent to Beaubien and Miranda enured immediately upon its being issued to the benefit of the Maxwell Land-Grant Company, a corporation which has the beneficial interest in the grant, so far as appears in this record, and the contest is mainly if not exclusively between the United States and that company.

The original bill filed in the case assailed the grant mainly upon the ground that the patent was issued by the Executive Department of the government upon the false representations of the defendant, the Maxwell Land-Grant Company, and those whose estate the company has in the land, and of whose fraudulent actings and doings in the premises the company had notice at the time it acquired the title. This bill recites the original grant of January 10, 1841, by the Republic of Mexico, which it declares was in due form of law, made to Beaubien and Miranda, citizens of said republic, and it gives the description of the land and its boundaries which is here the subject of controversy. The bill also declares that said grant and the proceedings had in regard thereto were in due form of law and in accordance with the usages and customs of that country, as more fully appeared by reference to the grant and act of possession, copies of which were annexed thereto, and that it was duly accepted by the grantees, who immediately thereupon entered into possession of the premises, and that they, and those holding under them, have ever since been in the quiet, peaceable and exclusive possession thereof.

The bill then declares that the Surveyor General of the territory of New Mexico, under the act of 1854, made a report in favor of this grant; that on June 21, 1860, the Congress of the United States confirmed and ratified it as recommended; and that the patent was afterwards issued upon a survey made by order of the government under the instructions of the Surveyor General of New Mexico, approved by the Commissioner of the General Land Office, which patent is made an exhibit to the bill. This original bill then goes on to charge that the survey on which this patent was issued was falsely and fraudulently made, and that the Maxwell Land-Grant Company, and certain parties who made this survey under a contract with the government, conspired to cheat and defraud the government of the United States by including a larger amount of land than was intended to be embraced by the original grant of the Republic of Mexico; and it especially charged that about 265,000 acres, to wit.

all the lands lying and being in the county of Las Animas, in the state of Colorado, were fraudulently included in this survey, and were of the value of two millions of dollars. The main purpose of the bill, and the only specific prayer for relief, is, that the survey may be declared void so far as it includes lands within the state of Colorado, though it concludes by praying for general relief.

It is quite obvious that the ground of relief set out in this bill is that the excess of 265,000 acres lying within the present state of Colorado was included within the survey by fraud, and that this fraud should be remedied. No attempt is made in the bill to assail the remainder of the grant or to point out any reason why the patent should not be good for all the lands in New Mexico. After answers had been filed to this bill, and a large amount of testimony taken, there was filed, on the 5th day of December, 1883, an amended bill, which it is now insisted is substituted for the original bill. In this amended bill, for the first time, it is set up, as a ground for setting aside the patent and survey on which it was made, and having them declared void, that under the laws of Mexico at the time it was made, no such grant could exceed eleven square leagues to each individual, and that by virtue of those laws, therefore, the grant to Beaubien and Miranda could not exceed twenty-two leagues, the equivalent of which is 97,424 acres. The bill then sets out with something more of particularity the errors supposed to exist in the survey on which the patent from the United States was based, and the frauds connected with that survey by which the officers of the government were imposed upon and induced to issue the patent. Much of the testimony, and perhaps most of it, was taken before this amendment was filed, and it is strongly insisted in the brief of the appellees, that the reason for filing it was that the testimony taken in regard to the frauds, and in regard to the mistake of the officer of the government in running the boundaries of the grant, had failed to establish such fraud and mistake.

Answers and replications were filed in due time, and a large amount of testimony taken, which, with the pleadings,

documents and proceedings of the court, and other public bodies, constitute a printed record of nearly nine hundred pages.

The questions which are presented by this record and which demand our consideration may be divided into three:

First. Do the colonization laws of Mexico, in force at the time the grant was made to Beaubien and Miranda, namely, the decree of the Mexican Congress of August 18, 1824, and the general rules and regulations for the colonization of the territories of the Republic of Mexico of November 21, 1828, render this grant void, notwithstanding its confirmation by the Congress of the United States?

Second. If the grant be valid, is there such a mistake in the survey on which the patent of the United States was issued as justifies the court in setting aside both patent and survey?

Third. Was there such actual fraud in procuring this survey to be made and the patent to be issued upon it as requires that the patent be set aside and annulled?

As regards the first of these propositions, it is undoubtedly true that the decree of the Mexican Congress of 1824, in regard to grants of the public lands, declared, by Article 12, that "it shall not be permitted to unite, in the same hands, with the right of property, more than one league square of land suitable for irrigation, four square leagues in superficies of arable land without the facilities of irrigation, and six square leagues in superficies of grazing land."

It has been repeatedly decided by this court that it was the practice of the government of Mexico, under that article, to limit its grants of public lands in the territories to eleven square leagues for each individual.

But Article 14 of the same decree speaks of "the contracts which the *empresarios* make with the families which they bring, at their own expense, provided they are not contrary to the laws;" and Article 7 of the Rules and Regulations of 1828 speaks of "grants made to *empresarios*, for them to colonize with many families." It is a well known matter of Mexican history, that, by reason of there being vast quantities of unoccupied and unprofitable public land owned by the government

in its territories, contracts were made with individuals called *empresarios*, by which they were given very large bodies of land without any regard at all to the eleven league limitation, in consideration that they should bring emigrants into the country and settle them upon these lands with a view of increasing the population and securing the protection thus afforded against the wild Indian tribes on the Mexican borders.

There are many things in the history of this grant to Beaubien and Miranda which would seem to indicate that it was understood by the Mexican authorities to be a grant of the class just described.

In the petition of Beaubien and Miranda to Governor Armijo, on which the grant was founded, dated January 8, 1841, there is a very animated description of the condition of the Territory of New Mexico and its natural advantages, which were undeveloped for want of an industrious population. It also contains a description of the land, by its boundaries, which was granted by the governor in compliance with this petition, and as this description and its true construction is the foundation of the controversy in this suit with regard to the accuracy of the surveys, it is given here:

"The tract of land we petition for to be divided equally between us commences below the junction of the Rayado River with the Colorado, and in a direct line towards the east to the first hills, and from there running parallel with said river Colorado in a northerly direction to opposite the point of the Una de Gato, following the same river along the same hills to continue to the east of said Una de Gato River to the summit of the table-land (mesa); from whence turning northwest, to follow along said summit until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence following the line of said mountain in a southwardly direction until it intersects the first hills south of the Rayado River, and following the summit of said hills towards the east to the place of beginning."

The authoritative grant of Governor Armijo, dated three days later, is in the following language:

"SANTA FÉ, *January* 11, 1841.

"In view of the request of the petitioners, and what they state therein being apparent, this government, in conformity with law, has seen proper to grant and donate to the individuals subscribed the land therein expressed, in order that they may make the proper use of it which the law allows.

"ARMIJO."

Looking to this question of the nature of the grant, as to whether it was an ordinary grant, it appears by the record that Beaubien made application in April, 1844, to the governor of the Department, stating that a curate named Martinez was seeking to invade and dispute the rights of the said Beaubien and Miranda in a part of the lands included in their grant. In this petition, remonstrating against a recognition of the claim of Martinez which had been made by the Territorial government, he says:

"And not only does the suspension of labor on those lands injure us, for the reason of having incurred heavy expenses, but also a considerable number of families and industrious men, who are willing and ready to settle upon those lands, and to whom we have given lands, a list of which individuals I accompany in order that your excellency, seeing their number, may determine what may be proper."

This shows that the grantees were engaged in settling families within the boundaries of their grant.

This matter was referred to the Departmental Assembly, who made a report upon the subject, confirming the grant of the governor to Beaubien and Miranda, and deciding against the claim of Martinez and his associates. The Assembly in making their report upon this subject declare the statements by which Martinez and his associates had obtained certain privileges within the boundaries of the grant to have been false, and proceed as follows: "And in view of the documents which accredit the legitimate possession of Miranda and Beaubien, and their desires that their colony shall increase in prosperity and industry, for which purpose he has presented a long list of persons to whom they have offered land for culti-

vation, and who shall enjoy the same rights as the owners of the lands; that the government, having dictated the step for the sole object of ascertaining the truth, that the truth having been ascertained, and the right of the party established, is of the opinion that the aforesaid superior decree be declared null and void, and that Miranda and Beaubien be protected in their property, as having been asked for and obtained according to law."

To this the governor ordered the response to be made, that, in accordance with the opinion of the Departmental Assembly, thus certified to him, "the order of the 27th of February, issued by this government, forbidding the free use of the land in question, is repealed, and Messrs. Beaubien and Miranda are fully authorized to establish their colony according to the offers made by them when they petitioned for the land which has been granted to them."

It would seem from these orders, decrees, and resolutions of the governor and Departmental Assembly of the Territory of New Mexico, that they must have supposed that the grant was intended for families to be settled upon, and was not one of those in which an individual could only receive a definite quantity of land for the purpose of his own settlement and cultivation. There would have been little cause for the frequent use of the words "colony" and "colonization" and such expressions as "settling families" in the colony, unless such was the view which the granting power took of the nature of the grant.

The effect of the action of the Departmental Assembly in regard to these grants of land within the territories over which they had jurisdiction is one which has been frequently considered in this court, and the importance of their action fully stated. *Hornsby et al.* v. *United States*, 10 Wall. 224; *United States* v. *Osio*, 23 How. 273.

The final confirmation of this grant by the Congress of the United States in 1860 affords strong ground to believe that that body viewed it as one of this character, and not one governed by the limitation of eleven square leagues to each grantee. The act by which that was done was approved

June 21, 1860, and is entitled "An act to confirm certain private land claims in the Territory of New Mexico." 12 Stat. 71. These claims, having been reported favorably to Congress for confirmation by the surveyor general of the Territory of New Mexico, were numbered in consecutive order, and referred to in that act by their numbers. The one now under consideration was number fifteen. The first section of that act reads as follows:

"That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor general of that territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty-eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor general as number sixteen, be, and they are hereby, confirmed: *Provided*, That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants."

It will be very clearly perceived by the proviso of this act that the attention of the framers of the statute was turned to the law of Mexico which limited the ordinary grant of land to each individual to eleven square leagues; for, in regard to claim number seventeen, it was expressly provided that it should not be confirmed for more than eleven square leagues to each of the claimants. As the claim of Beaubien and Miranda was like that of Vigil and St. Vrain in number seventeen, a grant to two persons, it must be obvious that the attention of the framers of the act was called to the fact, that, in the one instance, however large the claim might be, it should only be confirmed for eleven square leagues to each grantee, according to the law of 1824, while in regard to the other, in a like grant to two persons, which the surveyor gen-

eral and the Commissioner of the General Land Office, as well as the Congress of the United States, must have known included many times eleven square leagues, they made no such restriction.

The second section of the act of 1860 declares: "That in surveying the claim of said John Scolley it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain the location shall be made as follows, namely: The survey shall first be made of all tracts occupied by actual settlers, holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section."

The fair inference from all this is, that Congress, in passing this statute, considered some of the grants as being of the character to which the limitation applied, and did not so consider others, though they included immense areas.

But whether, as a matter of fact, this was a grant, not limited in quantity, by the Mexican decree of 1824, or whether it was a grant which in strict law would have been held by the Mexican government, if it had continued in the ownership of the property, to have been subject to that limitation, it is not necessary to decide at this time. By the treaty of Guadalupe Hidalgo, under which the United States acquired the right of property in all the public lands of that portion of New Mexico which was ceded to this country, it became its right, it had the authority, and it engaged itself by that treaty to confirm valid Mexican grants. If, therefore, the great surplus which it is claimed was conveyed by its patent to Beau-

bien and Miranda was the property of the United States, and Congress, acting in its sovereign capacity upon the question of the validity of the grant, chose to treat it as valid for the boundaries given to it by the Mexican governor, it is not for the judicial department of this government to controvert their power to do so. *Tameling* v. *United States Freehold Co.*, 93 U. S. 644.

This case of Tameling, while it cannot be said to be conclusive of the one now before us, for the reason that that was an action of ejectment founded upon a title confirmed by an act of Congress, in which the title could not be collaterally assailed for fraud or mistake, and the present is a suit attacking the patent and the survey upon which it issued directly by a bill in chancery to set them aside for such fraud and mistake, still the opinion announces principles which, as applicable to this case and as regards the question of the extent of the grant, it would seem should govern it. The title in that case was confirmed to Tameling's predecessor in interest by the same act which confirmed the grant now in question to Beaubien and Miranda, the one being number fourteen and the other number fifteen, as enumerated in the section of the statute already recited. In regard to that statute, and its effect upon the title confirmed by it, this court (p. 662) says: "No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim reserved to Congress is, of course, conclusive, and therefore not subject to review in this or any other forum. It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action. . . . Congress acted upon the claim 'as recommended for confirmation by the surveyor general.' The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract. The plaintiff in error insists

that, under the Mexican colonization laws in force when the grant was made, not more than eleven square leagues for each petitioner could be lawfully granted. As there were in the present instance but two petitioners, and the land within the boundaries in question is largely in excess of that quantity, the invalidity of the grant has been earnestly and elaborately pressed upon our attention. This was a matter for the consideration of Congress; and we deem ourselves concluded by the action of that body. The phraseology of the confirmatory act is, in our opinion, explicit and unequivocal."

It will be seen that the same question was raised in that case, as in this, in regard to the effect of the decree of the Mexican Congress of 1824 in limiting the extent of the grant, which by its boundaries very largely exceeded the quantity which the two petitioners in that case, as in this, would be entitled to. The cases were numbers fourteen and fifteen out of a series of eighteen or twenty. They were confirmed by the same section of the same statute and were in immediate contiguity in the context. In both there were two claimants under the same grant, who would have been entitled, under the decree of 1824, if applicable to the case, to twenty-two square leagues, that is, to eleven square leagues each. They were recommended for confirmation by the same surveyor general who had investigated the titles and who was authorized by the statute which created his office to pass upon the extent as well as the validity of the grants. The question was, therefore, in the Tameling case precisely the same as in the present, and it is not perceived how the questions of reforming the grant by a direct proceeding in chancery, and giving a construction to it in an action of ejectment, can be decided upon any different principles. If the Mexican government had no power to grant anything beyond twenty-two square leagues in either case, the excess of the grant beyond that was void. This objection could as well be taken in an action of ejectment, where no particular twenty-two leagues had been set apart out of the much larger grant covered by the boundaries, as it could by a bill in chancery to set aside or correct the patent. The principles of law applicable to the

issue are the same in both cases, and the declaration of the court in the Tameling case, that this was matter for the consideration of Congress, and it deemed itself concluded by the action of that body, is as applicable to the present case as it was to that.

The argument is here much pressed that the power of the surveyor general of New Mexico, in investigating and reporting upon these Mexican grants, was limited to ascertaining the validity of the claim as a grant by the Mexican government, and not to its extent, and that the act of Congress confirming the report of that officer and confirming the grant was not intended to be conclusive in regard to the boundaries or the quantity. But § 8 of the act of July 22, 1854, 10 Stat. 308, under which the report of the surveyor general was made in regard to these claims, directs him to ascertain the *extent*, as well as other elements of the claims to be referred to him. The language of that section is as follows:

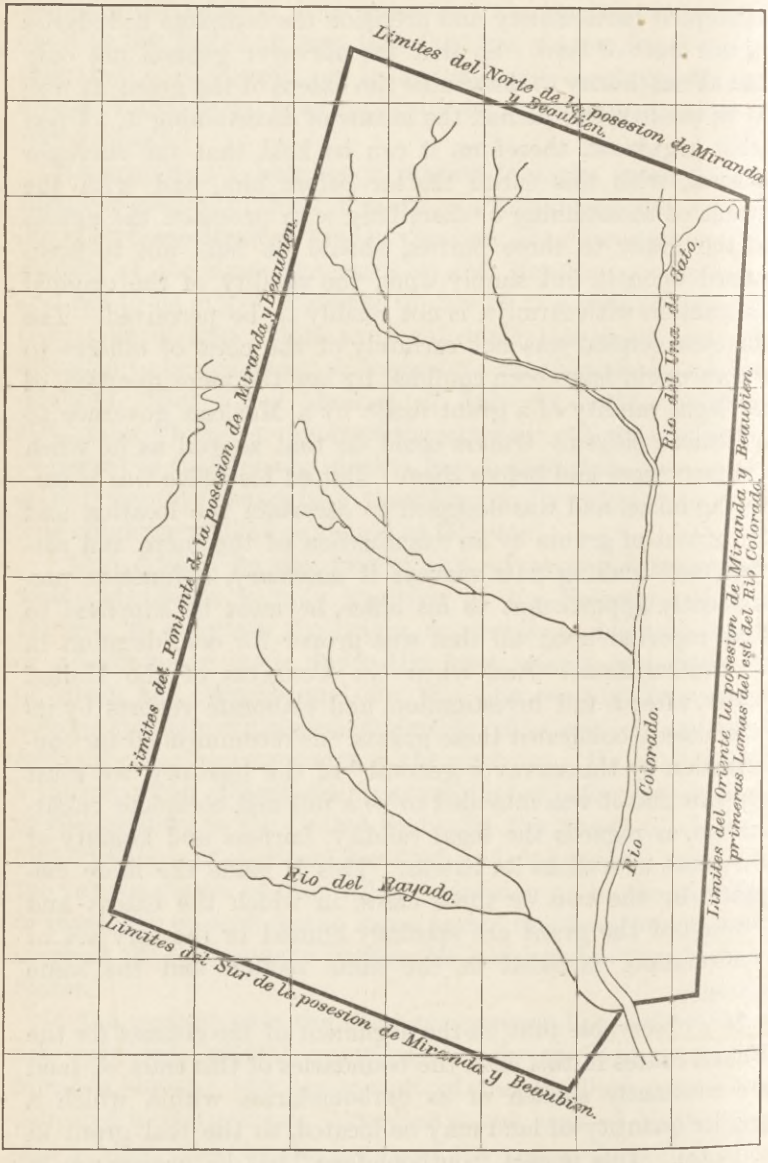
"That it shall be the duty of the surveyor general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character and *extent* of all claims to lands under the laws, usages and customs of Spain and Mexico, and for this purpose [he] may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States."

In the present case the surveyor general had before him, not only the original grant of Armijo to Beaubien and Miranda, but he had the record of the juridical possession delivered to the grantees, according to the laws of Mexico on that subject, made by the justice of the peace, Cornelio Vigil, accompanied by a map or diseño[1] laying down with at least

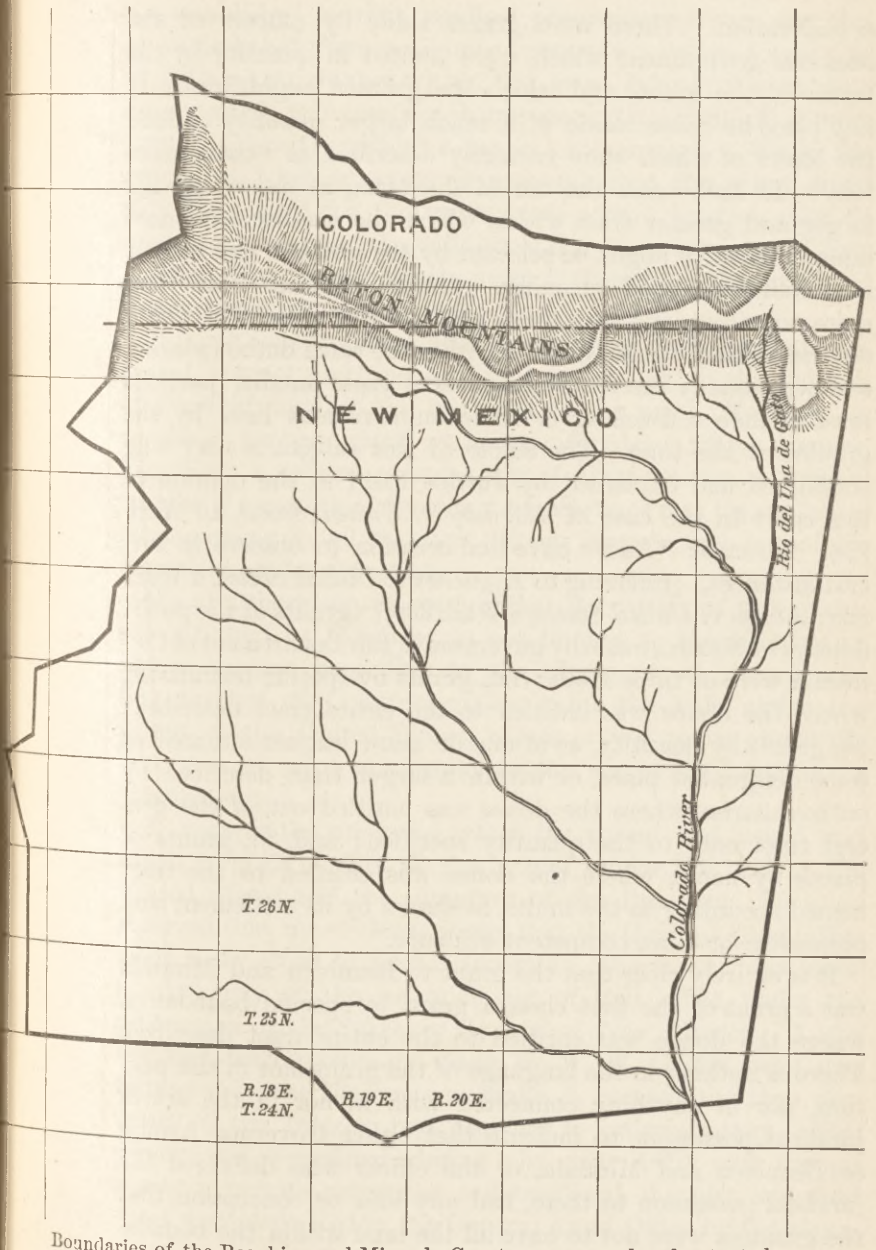
[1] This diseño will be found on page 370.

attempted particularity and precision the complete boundaries of this tract of land. So that the surveyor general not only had the authority to determine the extent of the grant, as well as its validity, but he had the means of ascertaining it. Upon what argument, therefore, it can be held that the surveyor general, with this entire matter before him, and with the means of ascertaining or describing with precision the extent of the grant to these parties, should be held not to have passed upon it, but simply upon the validity of the original transaction with Armijo, is not readily to be perceived. The surveyor general was not certainly of the class of officers to whom would have been confided by law the mere question of the legal validity of a grant made by a Mexican governor to a Mexican citizen. Others could do that as well as he when the facts were laid before them. But as his office was a surveying office, and was designed to ascertain the location and the extent of grants by an examination of the maps and surveys, and making new surveys if necessary, a function pre-eminently appurtenant to his office, he must be supposed to have reported upon all that was proper for consideration in its confirmation. And when the Congress of the United States, after a full investigation, and elaborate reports by its committees, confirmed these grants "as recommended for confirmation by the surveyor general" of the territory, we must suppose that it was intended to be a full and complete confirmation, as regards the legal validity, fairness and honesty of the grant, as well as its extent. This is made the more emphatic by the two or three cases, in which the extent and location of the grant are specially limited in the very act of confirmation, included in the same section and the same sentence.

It is observable that, in the argument of the counsel for the United States in this case, the boundaries of this tract of land are constantly spoken of as outboundaries, within which a smaller quantity of land may be located, as the real grant in this case. This phrase, "outboundary," has its proper use in regard to certain classes of Mexican grants, but it is wholly inapplicable and misleading as referring to the one now under



1. Sketch from the Diseño of the Beaubien and Miranda Grant, extended on the lines of United States surveys.



Boundaries of the Beaubien and Miranda Grant, as surveyed and patented.

consideration. There were grants made by officers of the Mexican government which were limited in quantity by the terms of the grant, and which the grantee might locate at any place he chose inside of a much larger quantity of land the limits of which were correctly described as "outboundaries." In such cases the use of the term, as describing the larger and greater tract within which the smaller and more limited quantity might be selected by the grantee, had its just and well-understood meaning. Grants of that class were quite numerous, and sometimes half a dozen grants to different individuals would be made within the same outboundaries, and occasionally there are cases where these smaller portions must include a dwelling or some improvement held by the grantee at the time. The whole of this subject is very well considered and explained by Justice Field in the opinion of this court in the case of *Hornsby* v. *United States*, 10 Wall. 224. He says: "As we have had occasion to observe in several instances," [referring to *Higueras* v. *United States*, 5 Wall. 828; *Alviso* v. *United States*, 8 Wall. 339,] "grants of the public domain of Mexico, made by governors of the Department of California were of three kinds: 1st, grants by specific boundaries, where the donee was entitled to the entire tract described; 2d, grants by quantity, as of one or more leagues situated at some designated place, or within a larger tract described by outboundaries, where the donee was entitled out of the general tract only to the quantity specified; and 3d, grants of places by name, where the donee was entitled to the tract named according to the limits, as shown by its settlement and possession, or other competent evidence."

It is entirely clear that the grant to Beaubien and Miranda was a grant of the first class, a grant by specific boundaries, where the donee was entitled to the entire tract described. There is nothing in the language of the grant, nor in the petition, nor in anything connected with it, nor in the act of juridical possession, to indicate that either Governor Armijo or Beaubien and Miranda, or the officer who delivered the juridical possession to them, had any idea or conception that the grantees were not to have all the land within the bounda-

ries established by that juridical possession. Hence the idea of counsel that there were only twenty-two square leagues, or 97,424.8 acres, granted within this great boundary is entirely unsupported, the case not being one of a grant of a more limited quantity within a larger outboundary. While the argument, whether sound or unsound, that the grant could only be upheld for the twenty-two square leagues, may be pressed now against the validity of the grant in excess of that amount, there was evidently no such thought in the minds of the parties when it was made.

It is not inappropriate here to allude to an argument suggested, but not much pressed, by counsel, that, in the petition of Beaubien against the intrusion of the priest Martinez, he speaks of his own grant as being only about fifteen leagues. We think a critical examination of that petition will show that he is speaking of the claim of Martinez and his associates as amounting in all to about fifteen leagues, and not of his own claim under the grant.

We are, therefore, of opinion that the extent of this grant, as confirmed by Congress, is not limited to the twenty-two square leagues, according to the argument of counsel, and that the act of Congress makes valid the title under the patent of the United States, unless proved to be otherwise, by reason of error or mistake in the survey, or fraud in its procurement.

As regards the survey on which the patent was issued, and which is made a part of the patent, under the seal of the United States and the signature of the President, it is to be observed that the evidence shows that the General Land Office made every effort to have it accurate. The survey was made by authority of the commissioner of that office, under the supervision of the Surveyor General of New Mexico. A survey had been previously made by W. W. Griffin, who was employed by the claimants to make it, because the then Secretary of the Interior had declined to order a survey. This survey was completed during the year 1870, and though purely a private enterprise and unofficial, the plat and field notes were deposited in the General Land Office by the claim-

ant, presumably for the information of the government as to the exact location of the exterior lines as claimed by the owners of the grant. The Land Office having afterwards, under the influence of the decision of the Supreme Court in *Tameling* v. *United States Freehold Co.*, determined that it was its duty to ascertain the extent of this grant and to issue a patent for it, was about issuing orders to the Surveyor General of New Mexico to have this grant surveyed, when it was suggested by the claimants that the commissioner should adopt the survey of Griffin, above referred to. He, however, declined to pursue this course; first, because he did not think it was a proper procedure; and second, because he did not think that the eastern and northern boundaries had been correctly located by the Griffin survey. The Surveyor General thereupon made a contract for the work with Elkins and Marmon, and the Commissioner of the General Land Office, in approving this contract, gave his own directions as to how these boundaries should be located, and furnished for the guidance of the surveyors an explanatory diagram. This survey was made in the autumn of 1877. The map[1] or plat of it is a part of the record, together with the proofs taken by the surveyors to establish the calls of the grant. Contests were initiated before the Surveyor General upon the validity of this survey by parties who were interested against it, and the case was fully heard on testimony, which testimony was filed with the Commissioner of the General Land Office. He finally approved the survey, and the patent was issued in accordance with it on May 19, 1879.

It is attempted in argument here to point out many errors and mistakes as objections to the accuracy of this survey. There is no reason to doubt that the Surveyor General and the officers employed by him, and the Commissioner of the General Land Office, all of whom gave particular attention to this survey, were well informed on the subject. They knew that it was an immense tract of land, that it would be the subject of grave criticism, and they knew more about it and were better capable of forming a judgment of the correctness of that sur-

[1] See page 371.

vey than this court can be. We may add, that, after all the research, industry, and ability of special counsel for the government, when the testimony taken in the case to prove these errors, and the record of the juridical possession, have been considered with the best judgment that we can bring to them, we are not satisfied that the survey is in any essential particular incorrect; but, on the whole, we believe that it substantially conforms to the grant originally made by Governor Armijo.

The principal point in dispute to which the argument of counsel has been addressed is, that the part of the land included in this survey, north of the present line, which divides the state of Colorado and the territory of New Mexico, was improperly included within the survey. In other words, it is argued that this northern line of the survey should have been run from the east to the west upon the summits of the Raton mountains. This range of hills, rather than mountains, seems to project itself as a spur from the great range running north and south which divides the waters that flow east from those which flow west. Running almost due east as you ascended along the foot of this range of hills, on their south side, is the stream called the Colorado River, which seems to spring from the great mountain range before mentioned. The language descriptive of the land in the petition of Beaubien and Miranda, which was granted and donated to them by Governor Armijo, as "therein expressed," is as follows:

"The tract of land we petition for to be divided equally between us commences below the junction of the Rayado River with the Colorado, and in a direct line towards the east to the first hills," [about which there does not seem to be much difficulty,] "and from there running parallel with said River Colorado, in a northerly direction to opposite the point of the Una de Gato, following the same river along the same hills to continue to the east of said Una de Gato River to the summit of the table-land (mesa), from whence, turning northwest, to follow along said summit until it reaches the top of the mountain which divides the waters of the rivers running towards the east from those running towards the west, and from thence following the line of said mountain in a southwardly direction

until it intersects the first hills south of the Rayado River, and following the summit of said hills towards the east to the place of beginning."

Now, it is this northeastern corner whence the course turns to the northwest which is the great subject of controversy, the line following the summit of the mesa, or table-land, to the summit of the mountain. This part of the Colorado River is a natural object which could not be mistaken, and which it is now claimed is the true course of the line, except that it is asserted that it should have followed the summit of the Raton mountains, which are just north of it, and running parallel with the river. That range is also a natural object, easily ascertained, and it would seem but reasonable that one or the other of those objects should have been selected by the grantor as descriptive of the place where this northern line should be located. Instead of this, however, it is said to run to the "summit of the table-land, from whence turning northwest, to follow along said summit," [which evidently means the summit of the table-land,] "until it reaches the top of the mountain." The longest line of the survey is from the southeast corner, in a northerly direction, parallel with the Colorado River; and if the line now contended for by appellant was the true east and west line, it need only have been stated in the grant that it should follow the course of that river to its origin, in the same mountain, which separates the waters of the rivers running east and west. But instead of speaking either of that river in its course from west to east, or of the Raton mountains, as the natural object which constituted the northerly boundary of the grant, it requires the boundary line to leave the Colorado River at the junction of the Una de Gato River with it, and continuing along a range of hills "to the east of the Una de Gato River to the summit of the tableland." This is not only a strong indication that the northern boundary was not where it is claimed to be by counsel for appellant, but that it was somewhere else; that it was not a range of hills nor a river already mentioned in the grant, but that it was something else called the "summit of the tableland," north of both of these. And although there

is some contrariety of opinion about this "summit of the table-land" which is to constitute the northeastern corner of the grant, we are of opinion, upon a consideration of all the evidence before us, that the survey was located as nearly in accordance with the terms of the grant as it is possible now to ascertain them.

Without going into this evidence more minutely, we are content to say that, while in favor of the correctness of this survey, in the points assailed, it is as strong or stronger than that for any other survey which could be made, or which has been suggested by the counsel for the United States, we are very clear that it is not the province of this court to set aside and declare null and void these surveys and patents approved by the officers of the government whose duty it was to consider them, and who evidently did consider them with great attention, upon the mere possibility or a bare probability that some other survey would more accurately represent the terms of the grant.

The question of fraud in the location of this survey, which is about all the allegation there is of actual fraud in the title of the defendants, is not deserving of much consideration. We are compelled to say that we do not see any satisfactory evidence of an attempt to commit a fraud, and still less of its consummation. As to the principal officers of the government who were connected with that survey, to wit, the Commissioner of the General Land Office and the Surveyor General of the territory of New Mexico, there is not the slightest evidence that they were governed by any fraudulent or improper motive in their acts in regard to this survey, or that they displayed any leaning towards the grantees in ascertaining the true boundaries of the grant. Nor is there any serious attack upon the subordinates of those officers, or any of the persons actually engaged in making the survey, in regard to their honesty of purpose or interest in the result. The principal argument of counsel upon this subject is based upon the Griffin survey, already mentioned, which was deposited by the claimants in the office of the surveyor general of New Mexico. It is argued, in the first place, that this survey was

a very incorrect one, and that it included much more land than was granted by Governor Armijo; secondly, it is insisted that in this respect it was an intentional departure from a correct survey; and thirdly, that it was designed and intended by the claimants to impose this incorrect and fraudulent survey upon the Commissioner of the General Land Office and have him issue a patent for it.

As regards the first element of this allegation of fraud, the incorrectness of the survey and that it included more land than the grant authorized, the only minute and careful survey with which it can be compared is the one upon which the patent finally issued, and we must say, with the light we have upon the subject and the time we have been able to bestow upon its consideration, that it is by no means clear that the Griffin survey, in that respect, is not the most correct one. The defendants here are not in a condition to contest the final survey. It is their business and their duty, having accepted the patent upon it, to defend it. But if it were to their interest, or to anybody's interest, to show that the Griffin survey was the more correct one, it seems to us that arguments in its support would not be wanting.

In the second place, as to any intentional fraud on the part of Griffin or his assistants in the running of these boundary lines, there is not the slightest evidence. And lastly, as to the charge that the Maxwell Land-Grant Company knew this survey to be a false one, and that it included much more land than the company was entitled to, but that they nevertheless endeavored to impose it upon the Commissioner of the General Land Office as a correct survey, there are two emphatic answers: first, there is no evidence that they believed it to be a false survey, and they only asked, or seemed to ask, that this survey might be adopted, because the government had not made, and would not then make, one for itself, in order that they might get the patent to which they were entitled; second, the Commissioner was not imposed upon. If they attempted a fraudulent imposition, they were not successful; he rejected their survey altogether, caused another one to be made, and pointed out in his instructions to those who exe-

cuted the final survey the points of departure from that made by Griffin, upon which he insisted. It seems impossible, in the face of these circumstances, to assume that there was anything in the nature of fraud perpetrated in regard to the Griffin survey and its effect upon the final survey.

The great importance of this case, as regards the immense quantity of land involved and its value, reinforced by the circumstance of the number of cases coming before the courts, in which, under the directions of the Attorney General, attempts are made to set aside the decrees of the courts, the patents issued by the government, and, in this case, an act of Congress, seems to call for some remarks as to the nature of the testimony and other circumstances which will justify a court in granting such relief. The cases of this character which have come to the Supreme Court of the United States have been so few in number that but little has been said in regard to the general principles which should govern their decision. There are decisions enough to guide us in cases where a patent or other title derived directly from the government has been questioned in a collateral proceeding, brought to enforce that title or to assert a defence under it; but the distinction between this class of cases, in which all the presumptions are in favor of the validity of the title, and in regard to which a wise policy has forbidden that they should be thus attacked, and those like the present, in which an action is brought in a court of chancery to vacate, to set aside, or to annul the patent itself, or other evidence of title from the United States, is very obvious. In either case, however, the deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, demands that to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided. *United States* v. *Throckmorton*, 98 U. S. 61.

In the case of *United States* v. *Stone*, 2 Wall. 525, 535, this court said: "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy." This was a chancery proceeding to set aside a patent for land.

In the case of *Johnson* v. *Towsley*, 13 Wall. 72, the court, considering the force and effect to be given to the actions of the officers of the Land Department of the government, announces the doctrine that their decision, made within the scope of their authority on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that Department; and that as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question. But that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have by a mistake of the law given to one man the land which on the undisputed facts belongs to another, to give proper relief.

These propositions have been repeatedly reaffirmed in this court. *Moore* v. *Robbins*, 96 U. S. 530; *Marquez* v. *Frisbie*, 101 U. S. 473; *United States* v. *Atherton*, 102 U. S. 372; *Shepley* v. *Cowan*, 91 U. S. 330.

In the case of *The Atlantic Delaine Co.* v. *James*, 94 U. S. 207, Mr. Justice Strong, in delivering the opinion of the court, said, in regard to the power of courts of equity to cancel private contracts between individuals: "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them." In

Story's Equity Jurisprudence, § 157, it is said that relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. Chancellor Kent, in the case of *Lyman* v. *United Ins. Co.*, 2 Johns. Ch. 632, which had reference to reforming a policy of insurance, says: "The cases which treat of this head of equity jurisdiction require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court." See also *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass. 290.

We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which com-

mands respect, and that amount of it which produces conviction, shall make such an attempt successful.

The case before us is much stronger than the ordinary case of an attempt to set aside a patent, or even the judgment of a court, because it demands of us that we shall disregard or annul the deliberate action of the Congress of the United States. The Constitution declares (Article IV, § 1) that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States." At the time that Congress passed upon the grant to Beaubien and Miranda, whatever interest there was in the land claimed which was not legally or equitably their property was the property of the United States; and Congress having the power to dispose of that property, and having, as we understand it, confirmed this grant, and thereby made such disposition of it, it is not easily to be perceived how the courts of the United States can set aside this action of Congress. Certainly the power of the courts can go no further than to make a construction of what Congress intended to do by the act, which we have already considered, confirming this grant and others.

In regard to the questions concerning the surveys, as to their conformity to the original Mexican grant, and the frauds which are asserted to have had some influence in the making of those surveys, so far from their being established by that satisfactory and conclusive evidence which the rule we have here laid down requires, we are of opinion that if it were an open question, unaffected by the respect due to the official acts of the government upon such a subject, depending upon the bare preponderance of evidence, there is an utter failure to establish either mistake or fraud. For these reasons

The decree of the Circuit Court is affirmed.

The defendant in error filed a petition for a rehearing. The opinion of the court in denying this motion will be found in Volume 122.

FISHER *v.* KELSEY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Argued March 30, 1887. — Decided April 11, 1887.

The particular responsibility imposed, at common law, upon innkeepers does not extend to goods lost or stolen from a room in a public inn furnished to a person for purposes distinct from his accommodation as a guest.

A statute of Missouri provides that no innkeeper in that state "shall be liable . . . for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample." *Held*, That actual knowledge that a guest has in his possession merchandise for sale, or the consent of the innkeeper to the guest's use of one of his rooms for such a purpose, does not fix upon the innkeeper full responsibility for the safety of such merchandise: such responsibility arises only upon written notice being given as required by the statute.

This was an action at law. Judgment for defendants. Plaintiffs sued out this writ of error. The case is stated in the opinion of the court.

Mr. Chester H. Krum for plaintiffs in error submitted on his brief.

Mr. John W. Noble for defendants in error. *Mr. W. Hallett Phillips* and *Mr. H. Orrick* were with him on the brief.

Mr. Justice Harlan delivered the opinion of the court.

By the general statutes of Missouri of 1865, c. 99, it was provided that —

§ 1. "No innkeeper in this state, who shall constantly have in his inn an iron safe, in good order, and suitable for the safe custody of money, jewelry, and articles of gold and silver manufacture, and of the like, and who shall keep a copy of

this chapter printed by itself, in large, plain English type, and framed, constantly and conspicuously suspended in the office, bar-room, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary size plain English type posted upon the inside of the entrance door of every public sleeping-room of his inn, shall be liable for the loss of any such articles aforesaid suffered by any guest, unless such guest shall have first offered to deliver such property lost by him to such innkeeper for custody in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody, and to give such guest a receipt therefor.

§ 2. "No innkeeper in this state shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants; but innkeepers shall be liable for the losses of their guests caused by the theft or negligence of the innkeeper, or of his servants, anything herein to the contrary notwithstanding."

The last section was amended by an act approved April 1, 1872, so as to read: "No innkeeper in this state shall be liable for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants; nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample. But innkeepers shall be liable for the losses of their guests caused by the theft of such innkeeper, or his servants, anything herein to the contrary notwithstanding."

William M. Fisher, having in his possession, as a travelling salesman for the firm of which he was a member, certain goods, consisting mainly of gold chains, chain trimmings, and necklaces, was received, with his goods, into the Planters' House, in St. Louis — a public inn kept by the defendants in error — and was supplied, at his own request, with a room in which such articles could be exhibited to customers. During

his occupancy of the room for that purpose, $12,626.32 in value of the articles were, without his knowledge, taken and carried away, so that they could not be recovered. It does not appear that the loss was attributable to the neglect either of Fisher or of the innkeepers. Although the nature of his business was well known to the defendants, and they were aware that the articles in question were brought into the hotel to be exhibited for sale, in a room to be occupied for that purpose, written notice was not served upon them that Fisher had "such merchandise for sale or sample in his possession after entering the inn." In this action, brought to recover the value of the goods stolen or lost, the court held that such a notice was required, by the statutes of Missouri, in order to fix liability upon the innkeeper. The jury having been so instructed, there was a verdict and judgment for the defendants.

Although Fisher was received by the defendants into their hotel, as a guest, with knowledge that his trunks contained articles having no connection with his comfort or convenience as a mere traveller or wayfarer, but which, at his request, were to be placed on exhibition or for sale, in a room assigned to him for that purpose, they would not, under the doctrines of the common law, be held to the same degree of care and responsibility, in respect to the safety of such articles, as is required in reference to baggage or other personal property carried by travellers. He was entitled, as a traveller, to a room for lodging, but he could not, of right, demand to be supplied with apartments in which to conduct his business as a salesman or merchant. The defendants being the owners or managers of the hotel, were at liberty to permit the use by Fisher of one of their rooms for such business purposes, but they would not, for that reason and without other circumstances, be held to have had his goods in their custody, or to have undertaken to well and safely keep them as constituting part of the property which he had with him in his capacity as guest. Kent says that, "if a guest applies for a room in an inn, for a purpose of business distinct from his accommodation as a guest, the particular responsibility does not extend

to goods lost or stolen from that room." 2 Kent Com. 596. See also *Myers* v. *Cottrill*, 5 Bissell, 465, 470, Drummond, J.; Story on Bailments, § 476; *Burgess* v. *Clements*, 4 M. & S. 306; Redfield on Carriers and Bailees, 443; Addison Law of Contracts, 6th ed. 360.

Such, we think, was the state of the law in Missouri prior to the passage of the act of 1872. That act prescribes the conditions upon which an innkeeper in that state may be made liable for the loss of merchandise belonging to a guest, and brought into the hotel only to be exhibited or sold. In view of the large and constantly increasing business transacted by travelling salesmen, the legislature of Missouri deemed it just to all concerned, that their relations with innkeepers, in respect to goods carried by them, should be clearly defined and not left to depend upon mere inference or usage. The statute makes the innkeeper responsible, in every event, for the loss of baggage or other property of the guest by fire, intentionally produced by the innkeeper or his servants, or by the theft of himself or servants. But since the innkeeper is not ordinarily bound to the same care for the safety of goods, in the possession of a guest for the purpose merely of being exhibited or sold, as for articles carried by the latter for his comfort or convenience as a traveller, the statute changed the rule so as to make his responsibility the same in both cases; provided, in the former case, the person received as a guest gives written notice that he has merchandise for sale or sample in his possession in the hotel; leaving the innkeeper, upon such notice, to elect whether he will permit the guest to remain in the hotel with such merchandise for sale or sample. Notice in this form, when the guest is permitted to remain in the hotel with merchandise in his possession "for sale or sample," is made by the statute evidence that the innkeeper has assumed responsibility for the safety of such merchandise, to the full extent that he is bound by the settled principles of law for the safety of the baggage or other articles brought by guests into the hotel.

It is suggested that the purpose of the act of 1872 was to protect innkeepers, and, therefore, actual knowledge that a

guest has in his possession merchandise for sale, or, at least, the consent of the innkeeper to the guest's use of a room in his hotel for such purpose, should be deemed sufficient to fasten upon the innkeeper responsibility for the safety of such merchandise. It seems to us that the statute is equally for the benefit of travelling salesmen. Be this as it may, as the law in regard to the liability of an innkeeper is one of extreme rigor, he should not be held to any responsibility beyond that arising from the relation of innkeeper and guest, unless, at least, the circumstances show that he distinctly agreed to assume such additional responsibility. There is no pretence in this case that the defendants made an express agreement of that character. Nor can such an agreement be implied merely from the knowledge on the part of the innkeeper that a guest has in his possession in the hotel, for exhibition or sale, merchandise for the safe custody of which he is not ordinarily responsible. Such knowledge implies nothing more upon the part of the innkeeper than his assent to the use of his rooms for purposes of that kind.

If as to such merchandise, it is intended to hold the innkeeper to the strict liability imposed, at the common law, in respect to the baggage or other personal property of a guest, the statute indicates the mode in which that intention must be manifested. The guest must give notice of such intention. And as the notice is expressly required to be in writing, no other form of notice can be deemed a compliance with the statute. *Porter* v. *Gilkey*, 57 Missouri, 235, 237. With the reasons which induced the legislature to prescribe a written notice in order to fix upon the innkeeper responsibility for the safety of merchandise carried by travelling salesmen for sale or sample, we have nothing to do. The law of Missouri is so written, and it is our duty to give it effect according to the fair meaning of the words employed.

It results that the court below did not err in refusing the instruction asked by the plaintiffs, but correctly held that the absence of the written notice required by the act of 1872 was fatal to their right to recover. The judgment is

Affirmed.

LEHIGH WATER COMPANY *v.* EASTON.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Argued April 7, 1887. — Decided April 18, 1887.

The provision in the Constitution of the United States that "no State shall pass any law impairing the obligation of contracts" necessarily refers to the law made after the particular contract in suit.

The judgment of the highest court of a state involving the enforcement or interpretation of a contract is not reviewable in this court, under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless by its terms or necessary operation it gives effect to some provision of the state constitution, or some legislative enactment of the state claimed by the unsuccessful party to impair the contract in question.

BILL in equity in a state court of Pennsylvania to enjoin the municipal authorities of Easton, Pennsylvania, from constructing water works. Decree dismissing the bill, which was affirmed by the Supreme Court of the state. The plaintiff sued out this writ of error. The Federal question is stated in the opinion of the court.

Mr. Edward J. Fox and *Mr. Edward J. Fox, Jr.*, for plaintiff in error.

Mr. Robert I. Jones for defendants in error. *Mr. William S. Kirkpatrick* for the water commissioners of Easton, and *Mr. Frank Reeder* and *Mr. William Beidelman*, for the borough of Easton, were with him on the brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

For many years prior to June 21, 1880, the Lehigh Water Company, a corporation organized, under the laws of Pennsylvania, by the purchasers at judicial sale of the rights, powers, privileges, and franchises of the West Ward Company, also a Pennsylvania corporation, maintained a system of

water works whereby the inhabitants of the borough of Easton, in that Commonwealth, were supplied with water for domestic and business purposes. On that day, it accepted the provisions of an act of the General Assembly of Pennsylvania, approved April 20, 1874, entitled "An act to provide for the incorporation and regulation of certain corporations." By such acceptance it acquired the privileges, immunities, franchises, and powers conferred by the act upon corporations created under it.

It also became entitled to the benefit of the third clause of the 34th section of that act, relating to water and gas companies.

That clause provides:

"The right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter shall be an exclusive one; and no other company shall be incorporated for that purpose until the said corporation shall have from its earnings realized and divided among its stockholders, during five years, a dividend equal to eight per centum per annum upon its capital stock: *Provided*, That the said corporations shall at all times furnish pure gas and water, and any citizen using the same may make complaint of impurity or deficiency in quantity, or both, to the court of common pleas of the proper county, by bill filed, and after hearing the parties touching the same, the said court shall have power to make such order in the premises as may seem just and equitable, and may dismiss the complaints or compel the corporation to correct the evil complained of."

The seventh clause of the same section provides: "It shall be lawful at any time after twenty years from the introduction of water or gas, as the case may be, into any place as aforesaid, for the town, borough, city, or district into which the said company shall be located, to become the owners of said works and the property of said company by paying therefor the net cost of erecting and maintaining the same, with interest thereon at the rate of ten per centum per annum, deducting from said interest all dividends theretofore declared." Laws Penn. 1874, pp. 73, 93.

After the acceptance by the Lehigh Water Company of the provisions of the act of 1874, the constituted authorities of the borough of Easton, in conformity with a vote of its qualified electors, and under power conferred by acts of the General Assembly, approved March 12, 1867, and April 15, 1867, Laws Penn. 1867, pp. 412, 1253, 1254, determined to construct and itself maintain a system of public works for supplying its inhabitants with water.

This suit was brought by the Lehigh Water Company for the purpose of enjoining the authorities of the borough from constructing or providing such works or from appropriating money therefor. The suit proceeds upon these grounds: 1. That the acts of 1867 ceased to be valid after the adoption of the present constitution of Pennsylvania. 2. That the Lehigh Water Company acquired, by the act of 1874, the exclusive right to erect and maintain water works for supplying water to the inhabitants of Easton. 3. That the acts of 1867, if not superseded by the constitution of Pennsylvania, impaired the obligation of the contract created between that commonwealth and the company, by the latter's acceptance of the provisions of the act of 1874; consequently, they were void under the National Constitution.

The Supreme Court of Pennsylvania, affirming the judgment of the court of original jurisdiction dismissing the suit, held that the exclusive right acquired by the Lehigh Water Company, under the act of 1874, was exclusive only against other private water companies, and that the legislation did not intend to prohibit a city, borough, or other municipal corporation from providing its inhabitants with water by means of works constructed by itself from money in its own treasury; also, that the acts of 1867 were neither repealed by the act of 1874, nor superseded by the state constitution.

In reference to the remaining ground relied upon by the company the state court said:

"The third ground of objection is wholly without merit. By constructing water works of its own the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the com-

pany have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the state by contract has precluded itself from such new grant the incidental injury can constitute no obstacle. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Turnpike Co.* v. *The State of Maryland*, 3 Wall. 210; *Piscataqua Bridge* v. *New Hampshire Bridge*, 7 N. H. 35. No contract has been shown between the water company and the state by which the latter is precluded from granting to the borough of Easton the privilege of erecting works to supply its citizens with water." *Lehigh Water Co.'s Appeal*, 102 Penn. St. 515, 528.

The only question presented by the record which this court can properly consider is, whether the judgment below denies to the plaintiff in error any right or privilege secured by that provision of the Constitution of the United States which declares that "no state shall pass any law impairing the obligation of contracts." Obviously, this clause cannot be invoked for the reversal of the judgment below. It is equally clear that the law of the state to which the Constitution refers in that clause must be one enacted after the making of the contract, the obligation of which is claimed to be impaired. Neither the Lehigh Water Company nor its predecessor had, under any statute enacted prior to 1874, an exclusive right to maintain water works in the borough of Easton for supplying its inhabitants with water. Nor did the grant to the borough, in the acts of 1867, of the power to construct and maintain a system of public water works, infringe any right or privilege which the plaintiff in error *then* had under its charter. But the claim is, that the exclusive privilege acquired by the company under the statute of 1874 was impaired in value by the acts passed in 1867. It cannot, however, with propriety, be said that the obligation of a contract made with the state in 1874 was impaired by statutes enacted in 1867. Whether the former repealed, by implication, the acts of 1867, presents no question arising under the National Constitution. That is a question simply of statutory construction which the state

court was competent to determine, and whose judgment in respect thereto is not subject to reëxamination in this court. Had the borough of Easton been authorized by a statute enacted *after* the Lehigh Water Company had acquired the exclusive privilege given by the act of 1874, then this court would have been compelled to decide, upon its independent judgment, whether the latter applied only to private corporations; for, in such case, the determination of that question would be involved in the inquiry whether there was a contract between the state and the company, and, if there was a contract, whether its obligation was impaired by a law subsequently enacted. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697.

The argument in behalf of the company seems to rest upon the general idea that this court, under the statutes defining its appellate jurisdiction, may reëxamine the judgment of the state court in every case involving the enforcement of contracts. But this view is unsound. The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question. *Railroad Company* v. *Rock*, 4 Wall. 177, 181; *Railroad Company* v. *McClure*, 10 Wall. 511, 515; *Knox* v. *Exchange Bank*, 12 Wall. 379, 383; *Delmas* v. *Ins. Co.*, 14 Wall. 661, 665; *University* v. *People*, 99 U. S. 309, 319; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 582.

The judgment is *Affirmed.*

NOONAN *v.* CALEDONIA MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Argued March 29, 30, 1887. — Decided April 18, 1887.

During the trial in Dakota of adverse claims to a mineral location, it appeared that one M. not a party to the record, asserted an interest in the lode and was a necessary party to a complete determination of the matters in controversy. By consent of parties he was made a codefendant, defendant's counsel appearing for him, and an entry of it was made in the journal of proceedings, and a further entry that "any amendments to pleadings required to be prepared and served during the pendency of this action or at its conclusion." The trial then proceeded, M. participating as codefendant, and resulted in a verdict for the plaintiff. Before the entry of judgment plaintiff's attorney served on defendants' attorney a notice of an amendment to the complaint by inserting therein the name of M., together with an additional paragraph averring that he set up a claim of interest in the property, that it was without foundation, and asking the same relief against him as against the other defendants. Objection was taken to this mode of amending the pleadings for the first time in the Supreme Court of the territory on appeal. *Held*, That M. was sufficiently made party to the case by the proceedings and the amendment filed, and that he must be presumed to have adopted the answer of his codefendants.

Where an objection to the admission of evidence is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal unless it be of such a character that it could not have been obviated at the trial.

Where a party was, on the 28th February, 1877, in possession of a mining claim in the Black Hills of Dakota, within the Indian reservation, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day; and such location, labor, and improvements gave him the right of possession.

This was an action to determine the rights of the parties to mining ground in Lawrence County, in the territory of Dakota. In April, 1878, one of the defendants below, and of the appellants here, John Noonan, asserted ownership to a tract of mineral land in that county, bearing the name of the Bobtail Lode. It was of great value, and he desired to obtain a

patent of the United States for it. He therefore pursued the course prescribed in such cases by §§ 2325 and 2326 of the Revised Statutes; and, on the 20th of that month, filed the necessary application in the proper land office of the district.

At the same time Henry Lackey and eight other persons asserted ownership of mining ground known as the Caledonia Lode, which conflicted with the Bobtail claim, as alleged, to the extent of three acres and fifty-seven hundredths of an acre. They, therefore, in May, 1878, filed in the land office an adverse claim to the application of Noonan; and, in June following, brought the present action, to determine their respective rights to the disputed ground.

Subsequently, these adverse claimants sold their interest in the Caledonia lode to Thomas Bell, of San Francisco; and he conveyed the property to the Caledonia Gold Mining Company, a corporation organized under the laws of California. Upon application to the court, this company was substituted as plaintiff in the action, without prejudice to the rights of the defendants. An amended complaint was thereupon filed in its name, and substituted for the original one. It alleged the incorporation of the plaintiff under the laws of California; its compliance with the laws of Dakota relating to foreign corporations, to enable it to transact business, and to acquire, hold, and dispose of property in the territory; the transfer of the Caledonia lode to Thomas Bell; and his conveyance of the property to the company. It also set forth the original location of the lode by four of the original plaintiffs, on the 21st of June, 1876, and their actual possession thereof afterwards; and that they and the others of the original plaintiffs, who had become interested with them, made, on the 15th of March, 1877, an additional and supplementary claim and location of the Caledonia lode, and, on the same day, caused a certificate or notice of the original claim and location, as well as of the additional and supplementary claim and location, to be recorded in the mining records of the district.

The amended complaint further alleged, that, from its original location in June, 1876, the plaintiff or its grantors had been in the actual and continuous possession of the Caledonia

claim, and every part of it, and in accordance with the laws of the United States and of the territory of Dakota, and the local rules and regulations of miners in the district; and had expended, in labor and money, more than five thousand dollars in its development and improvement; that the defendant Noonan claimed an interest in a portion of its mining ground, to the extent of three acres and forty-seven hundredths of an acre, by virtue of an alleged location of a quartz mining claim, called the Bobtail lode, made by his predecessors in interest, in February, 1876, which was invalid and a cloud upon its title to the Caledonia lode. It prayed that the defendant might answer and set out particularly his claim to that portion of the Caledonia lode which conflicted with the Bobtail lode, and the nature of it; and that it might be adjudged that he had no estate or interest therein, and that he be enjoined from asserting any right or title to it.

The defendant, in his answer, denied the allegations of the complaint, except as they were afterwards admitted; and, specifically, any knowledge of the incorporation of the plaintiff, or of its compliance with the laws of Dakota in regard to foreign corporations; admitted his claim to be the owner of the Bobtail lode, his application for a patent, and the adverse action of the former plaintiffs; and set up the discovery and location of that lode on the 24th of February, 1876, by parties through whom he derived his interest.

A replication traversed some of the matters set up in the answer, and asserted an abandonment and forfeiture of the interests of the original locators of the Bobtail lode.

The action was tried by the court without the intervention of a jury, by consent of parties. During the trial it appeared that one Thomas F. Mahan asserted an interest in the Bobtail lode, and that he was a proper, if not a necessary, party to a complete determination of the matters in controversy. Thereupon, by consent of parties, he was made a codefendant in the action. The following was the entry made, at the time, in the journal of proceedings, following the title of the cause:

"Now, on this 15th day of July, A.D. 1880, the trial of the cause is resumed. By consent of all parties, Thomas F.

Mahan is made a party defendant in this action. Counsel for defendant appear and answer instanter for him, any amendments to pleadings required to be prepared and served during the pendency of this action, or at its conclusion."

It appeared that subsequently the two defendants joined in all proceedings taken. Before the entry of judgment, the plaintiff's attorneys, in order to make the record complete as to the new defendant, Mahan, instead of inserting his name at the proper place in the complaint, or re-writing it entirely, served upon the defendants' attorneys, and filed with the judgment roll, the following amendment:

"In the District Court, First Judicial District, Lawrence County, Dakota Territory.

"Caledonia Gold Mining Company, (formerly Henry Lackey et al.,) Plaintiff,
vs.
"John Noonan and Thomas F. Mahan, Defendants.

"Now comes the above-named plaintiff, and in pursuance and by authority of the court hereinbefore made, on the 15th day of July, 1880, making the said Thomas F. Mahan a defendant in this action, amends its amended and substitute complaint, which was herein filed November 6th, 1879, by inserting therein the name of the said Thomas F. Mahan as a defendant, and by inserting in and adding to said complaint, immediately after the subdivision thereof numbered nine, and before the prayer thereof, the following allegation, to wit:

"10. And plaintiff further avers that the defendant, Thomas F. Mahan, has, or claims to have, some right, title, or interest adverse to plaintiff in or to that portion of the said Caledonia lode claim above described by survey; that said claim of said defendant Mahan is without foundation or right as against plaintiff, but said Mahan persists in the same and makes said claim, as plaintiff is informed and believes, under the said alleged and pretended location of the said alleged Bobtail lode claim above described as coöwner with, and claiming under the same right as, defendant Noonan, as above mentioned, and that said claim of said Mahan casts a cloud upon plaintiff's

title to its said portion of said Caledonia lode above described, and plaintiff, therefore, makes said Mahan a defendant in this action, and asks the same judgment, decree, and relief against him as hereinafter prayed against said defendant Noonan.

"CLAGETT & DIXON,
Att'ys for Pl'tff."

No objection was taken in the District Court to this mode of amending the pleadings. It was made the subject of comment for the first time in the Supreme Court of the territory when the case was there on appeal, when it was contended that the amendment was irregular and insufficient, and left the original complaint without any allegations against the defendant Mahan, against whom, with the original defendant, the judgment was entered; and, therefore, that the judgment could not be sustained by the pleadings. That court held the objection to be untenable; and its ruling in this respect was assigned as error.

On the trial, the plaintiff, to establish its corporate existence, gave in evidence a copy of its articles of incorporation, certified by the clerk of the city and county of San Francisco, the place of its principal business, under his official seal, to be a correct copy of the original on file in his office; to which there was also appended a certificate of the secretary of state of California, under the seal of the state, that it was also a correct copy of those on file in his office. By the law of California, the articles upon which a certificate of incorporation is issued are required to be filed with the clerk of the county in which the principal business of the corporation is to be conducted, and a certified copy with the secretary of state. Civil Code, § 296. The plaintiff at the same time produced a copy of the articles on file in the office of the secretary of the territory, certified by him to be a correct copy, with the seal of the territory annexed. To the introduction of these certified copies it was objected, generally, that they were "incompetent, irrelevant, and immaterial," without any specification of the particular ground on which they were thus objectionable.

Opinion of the Court.

In the Supreme Court of the territory, on appeal, it was objected that the documents were not properly authenticated as required by the act of Congress, and that the certificates were signed by deputy officers; but that court held that the specific objection being one which, if taken below, might have been obviated there, it could not be urged on appeal under the general objection taken; and, therefore, ruled the point untenable. This ruling was also assigned as error.

Numerous other objections were taken by the plaintiffs, during the progress of the trial, to the introduction of evidence of acts of the predecessors of the plaintiff in locating and developing the Caledonia lode, previous to February 28, 1877, when the right of the Indians to the territory was extinguished by agreement with the United States. These and objections to the findings of the court on matters of fact constituted, in addition to those mentioned, the burden of the appellant's complaint. The court found for the plaintiff, and rendered judgment that it was the owner and entitled to the possession of the ground in controversy. On appeal to the Supreme Court of the territory, the judgment was affirmed, and the defendants have brought the case to this court.

Mr. Daniel McLaughlin for appellants. *Mr. William R. Steele* was with him on the brief.

Mr. T. L. Skinner and *Mr. S. S. Burdett* for appellee.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

The exceptions taken in the District Court were fully considered and answered by the Supreme Court of the territory in a clear and satisfactory opinion. The objections to the sufficiency of the evidence to justify the findings of fact cannot be heard here; they were matters for consideration only in the courts below. Of the numerous assignments of error presented to us, we deem only three of sufficient importance to require special consideration. They are:

1. That the judgment is not sustained by the pleadings;

2. That the articles of incorporation of the plaintiff were admitted in evidence without due authentication; and,

3. That evidence of acts of the predecessors of the plaintiff in locating and developing the Caledonia lode prior to the relinquishment of the Indian title to the United States was improperly admitted.

1. There would be some force in the objection that the judgment is not sustained by the pleadings, if the amendment joining Mahan as a codefendant with Noonan could not be read as a part of them. The judgment is against him as well as against Noonan, and there must appear somewhere in the record allegations by which it can be supported. It would have been the better course, when the order was entered that Mahan be joined as a codefendant, for the attorneys of the plaintiff to have had his name at once inserted in the complaint, with such other changes as to make the allegations apply to him. That such changes might have been made by consent of parties, without the formality of suspending the trial, and filing a new complaint, and waiting for an answer to it, there can be no doubt; and when thus made, the parties would be estopped from any subsequent objection to them. A provision of the Code of Civil Procedure of Dakota vests ample authority in the court to make changes of this character in furtherance of justice. Its language is: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleadings, process or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, if the amendment does not change substantially the claim or defence, by conforming the proceeding or pleading to the facts proved." § 142.

The trial continued after the amendment, the defendant Mahan participating in all its proceedings as if his name had been inserted in the complaint in the most formal manner, and he had answered it specifically. The agreement provided that the amendment might be made during the pendency of the action, or on its conclusion, and in accordance with it the

amendment to the complaint filed with the judgment roll may properly be read and treated as part of the pleadings. If the defendant Mahan had desired to file a formal answer to the allegations of the complaint, he should have insisted upon it at the time. He was probably satisfied with the answer of his codefendant on file, which put in issue the plaintiff's title and set up all that he could have pleaded for himself. He had on the trial all the benefits of the most formal answer, and his connection with the case as a party sufficiently appears from the amendment filed.

2. The objection to the introduction of the articles of incorporation at the trial was that they were "immaterial, irrelevant, and incompetent" evidence. The specific objection now urged, that they were not sufficiently authenticated to be admitted in evidence, and that the certificates were made by deputy officers, is one which the general objection does not include. Had it been taken at the trial and deemed tenable, it might have been obviated by other proof of the corporate existence of the plaintiff or by new certificates to the articles of incorporation. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. *United States* v. *McMasters*, 4 Wall. 680; *Burton* v. *Driggs*, 20 Wall. 125; *Wood* v. *Weimar*, 104 U. S. 786, 795.

3. The objection urged to the admission of evidence of acts done by the grantors of the plaintiff in locating and developing the Caledonia mine previous to February 28, 1877, is founded upon the treaty between the United States and the Sioux Indians, concluded on the 29th of April, 1868, and ratified on the 16th of February, 1869. By the second article, a district of country embracing the region known as the Black Hills of

Dakota, and which includes the mining property in controversy, was set apart as a reservation for the absolute and undisturbed use and occupation of those Indians, and such other friendly tribes or individual Indians to whose admission, from time to time, they and the United States might consent. And the United States stipulated that no person, except those designated and authorized by the treaty, and such officers, agents, and employes of the government as might be authorized to enter upon Indian reservations in the discharge of duties enjoined by law, should ever be permitted "to pass over, settle upon, or reside in the territory" described, or in such territory as might be added to the reservation. 15 Stat. 635.

In a subsequent agreement with the Indians, ratified by act of Congress on the 28th of February, 1877, the northern and western boundaries of the reservation were changed, leaving out the country of the Black Hills, which was relinquished by the Indians to the United States. That region was thus freed from the prohibition against settlement upon it, and opened like other public lands of the United States to exploration and occupation under the mining laws. It is contended that the treaty operated as an actual prohibition against all acts taken by the predecessors of the plaintiff in the location and development of their mine, until the supplemental agreement of 1877, and that no support to their title can be derived from such acts, and, therefore, that no evidence of them was admissible.

Notwithstanding the prohibition of the treaty, as soon as it became known, early in 1874, that the precious metals existed in the Black Hills, large numbers of persons entered upon the reservation and proceeded to appropriate mining ground, and to work and develop the mines. The subject soon attracted the attention of the public authorities, and an exploring expedition, to ascertain and report as to the mining and agricultural resources of the country, was organized and sent out by the Secretary of the Interior in 1875. The report of the geologist accompanying the expedition, made in November of that year, confirmed the existence of the precious metals on the reservation.

In the meantime, as early as June, 1875, the Secretary, under direction of the President, appointed a commission to visit the Sioux nation, with a view to secure to the citizens of the United States the right to mine in the country known as the Black Hills. Report of Commissioner of Indian Affairs for 1875, pp. 184 and 185. The commission was unsuccessful, but the government was determined, notwithstanding, to open the mineral lands to development; and by the act of August 15, 1876, 19 Stat. 176, making appropriations for the Indian service, it was provided that thereafter there should be no appropriation made for the subsistence of the Indians unless they should first agree to relinquish all right and claim to so much of their permanent reservation as lay west of the 103d meridian of longitude. This was the Black Hills country. Negotiations were resumed, and a supplementary agreement was concluded, which was approved February 28, 1877, relinquishing that portion of the reservation, and ceding it to the United States. 19 Stat. 254.

While it is true that, before the new agreement, the prohibition against settlement upon the country constituting the reservation of the Indians remained in full force, yet it was evident to all that it would soon be withdrawn by some arrangement; that immediately afterwards the mineral lands would be open to occupation and development; and that from that time mining claims taken up in the territory would be respected and protected. With the new agreement the results anticipated followed. The presence of the miners on the reservation up to that time was illegal, but from that time it was legal. Those then in possession of mining claims, which had been taken up and developed in accordance with the rules of miners in mining districts of the country, were entitled to protection in their possessory claims as against the intrusion of others. The effect of the withdrawal of the district from the reservation, and the consequent end of the prohibition, was to leave the predecessors of the plaintiff exempt from liability to be disturbed for their unlawful entry on the land, and free to take measures under the mining laws for the perfection of their claims. Evidence of what had been done by them, the

location of their claim, its extent, the amount of work done in its development, was competent, not as creating any absolute right to the property, but as showing the existence and condition of the property when their possession became lawful under the new agreement. Whether they should be protected in holding the property afterwards depended upon their future compliance with the laws, statutory and mining, governing the possession and use of mineral lands in Dakota. The rule laid down by the Supreme Court of the territory is, in our judgment, the correct one, which should govern cases of this kind, and that is substantially this : that where a party was in possession of a mining claim on the 28th of February, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore. he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day; and that such location and labor and improvements would give him the right of possession. By this rule substantial justice is done to all parties who were entitled to protection in their mining claims when the new agreement took effect.

Such proceedings were taken in this case by the owners of the Caledonia mine. They renewed their location and claim, making a record of their original claim and location and of the supplementary one, in the proper mining records of the district.

The case appears to have been examined with great care in the Supreme Court of the territory, and every consideration given to the positions of the appellants, and in its rulings we see no error.

Judgment affirmed.

LANIER *v.* NASH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Argued April 7, 1887. — Decided April 18, 1887.

On the facts proved the court holds that this suit was properly brought in the name of the plaintiffs in error, but that they were acting as trustees for others for whose benefit its results were to be applied, and it affirms the judgment of the court below.

To constitute a collusive assignment under § 5 of the act of March 3, 1875, c. 137, when the title made by the transfer is complete so as to give the assignee power to maintain suit in his own name, it must appear that the object of the transfer was to create a case cognizable under the act of 1875.

In equity to foreclose a mortgage. The case is stated in the opinion of the court.

Mr. Laurence Maxwell, Jr., for appellants.

Mr. John Coffey for appellees. *Mr. David Stuart Hounshell* filed briefs for same.

Mr. Chief Justice Waite delivered the opinion of the court.

This is a suit for the foreclosure of a mortgage made by John Nash and Ellen Nash, his wife, to Hugh Colville, under date of December 4, 1876, on certain lands in Logan County, Ohio, the separate property of the wife, to secure a note of the husband for $13,000, payable to the order of Colville, in three years from date, with interest at the rate of eight per cent. per annum, payable semi-annually, and the chief controversy on the appeal is as to the amount that is due. In the view we take of the case little else is involved except questions of fact. From the testimony we find that for many years prior to July 4, 1879, the Commercial Bank of Cincinnati was an unincorporated banking association, having its office in Cincinnati, Ohio. John Nash, a manufacturer, doing

business in that city, either alone or with others, under the name of John Nash & Co., had long been a customer of the bank, making deposits and getting discounts of his business paper as occasion required.

Some days before December 4, 1876, Nash, being in want of $12,000 to settle a debt which he owed for iron and to meet some other liabilities, applied to Colville, the cashier of the bank, for a loan of that amount on real estate as collateral. Colville, after consultation with the directors, agreed to let him have the money, and he thereupon procured the execution by his wife of the mortgage now in suit, and another on a house and lot she owned in Cincinnati to secure another note of his for $7000, payable to the order of Colville in three years from date, with interest at the rate of eight per cent. per annum, payable semi-annually. He then took the two notes and mortgages to the bank and placed them as collateral security for his own note for $12,000 at sixty days, which was discounted and placed to his credit in account. At the time this was done it was hoped and expected that Nash would get some one to lend him the money on the mortgages, and thus enable him to take up his note to the bank.

When this arrangement was made, Nash or his firm was indebted to the bank for notes of his customers that had been discounted and not paid at maturity to an amount between $4000 and $5000. As the notes which had been discounted were protested and came back, he gave his own notes or those of his firm for the same amount, payable at a future day, which were discounted and the old paper retained as collateral. An effort has been made in this case to show that, at the time the $12,000 was lent, it was agreed that the mortgages should be placed as collateral to the old debt as well as the new, but the preponderance of the evidence is decidedly the other way, and we have no hesitation in finding that no such agreement has been proven.

Nash continued in business until January, 1878, when he failed and made an assignment. In the meantime he had borrowed from the bank another $1000, which it is conceded was secured by a pledge of the notes and mortgages as collat-

eral. He renewed all his notes to the bank as they became due, until near the time of his failure, paying the interest thereon at each renewal. No payment of interest was ever made, however, on the mortgage notes, and on the 10th of May, 1879, a suit was begun by Colville, who was a citizen of Kentucky, in the Circuit Court of the United States for the Southern District of Ohio, for the foreclosure of that for $7000, on account of default in the payment of interest. While this suit was pending a corporation was organized under the name of the Commercial Bank of Cincinnati, which became in fact the successor of the old bank by taking its good assets and assuming its liabilities. Among the other assets transferred to the corporation were the debts of Nash and his firm, and their collaterals. In making this transfer Colville indorsed the note for $13,000 in blank, and the note and the mortgage for its security were delivered to the new bank. He also made an assignment of his interest in the suit then pending on the other note and mortgage. The president and cashier of the new bank were different from those of the old bank, but some, if not all, the directors of the new were the same as those in the old.

On the 30th of August, 1879, a decree *pro confesso* was entered in the suit for the foreclosure of the $7000 mortgage, under which a sale of the mortgaged property was made, which realized $6532.72 over and above the costs and expenses, and this amount was paid to the new bank on the 28th of November, 1879.

The note of $13,000 fell due December 7, 1879, and on the 12th of November next, before its maturity, it was sent by the president of the new bank to Winslow, Lanier & Co., the plaintiffs in this suit, enclosed in a letter, of which the following is a copy:

"CINCINNATI, O., *Nov.* 12, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I enclose herewith note of John Nash with mortgage, dated Dec. 4th, 1876, at 3 years, with interest at 8 per cent., for $13,000; the first two years' interest paid.

"I will thank you to place this note to the credit of the bank under discount, and oblige,

"Yours, very resp'y,

"(Signed) CHAS. B. FOOTE, *Pr's't.*"

Accompanying the note when sent was this guaranty written on a separate piece of paper:

"The Commercial Bank of Cincinnati hereby guarantees collection and payment of the note of John Nash to the order of Hugh Colville, dated Dec. 4, 1876, for $13,000, at 3 years, with interest at eight per cent. annually, and the mortgage securing the same, if purchased by Mess. Winslow, Lanier & Co. The first two years' interest has been paid.

"(Signed) CHAS. B. FOOTE, *Pres't.*"

Winslow, Lanier & Co. were bankers in the city of New York, and had been for many years the correspondents of the old bank in that city, and the new bank continued the same business relations with them on its organization. On the receipt of the note the credit was given for the amount of the note and one year's interest, less the discount until maturity, as requested. Afterwards the president of the Commercial Bank wrote Winslow, Lanier & Co. as follows:

"COMMERCIAL BANK, CINCINNATI, O., *Nov.* 28, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I have to ask you to notify John Nash and wife, (West Liberty, Logan County, Ohio,) immediately by letter that you hold the note and mortgage for $13,000 and int., requesting payment accordingly at maturity.

"In your letter to them please say nothing concerning the first two years' interest, as the sum collected by us from other collections may not prove to be sufficient to pay the entire two years' interest, as it was supposed it would. In case this debt should not be paid at maturity I have further to ask that you do not charge it to our ac., but hold it so that suit can be brought by you if necessary. I enclose a letter to me from our att'ys, King, Thompson & Maxwell, which please read and return to me. Very respectfully,

"CHAS. B. FOOTE, *P's.*"

"CINCINNATI, *Dec.* 3, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I have your favor of 1st inst. It was intended that the guaranty of this bank for the collection and payment of the note of Jno. Nash, dated Dec. 4, 1876, at 3 years, with 8 per cent. interest, should continue in full force until the final collection of the debt. This guaranty is hereby confirmed and continued in full force until the final collection of the note. I enclose confirmation from Mr. Sherlock to the same effect. Very resp't,

"(Signed) CHAS. B. FOOTE, *Pres.*"

"COMMERCIAL BANK, CINCINNATI, OHIO, *Dec.* 10, 1879.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: I have your favor of 8th inst. inclosing copy of a letter from Mess. Avery & L'Hommedieu, attorneys for John Nash. I shall be obliged if you will reply to Mess. Avery & L'Hommedieu, notifying them that unless the debt is immediately paid or satisfactorily arranged the note and mortgage will be put in suit by you.

"In case suit becomes necessary I will thank you to place the paper in the hands of the Hon. R. P. Ranney, Cleveland, Ohio, (unless you prefer other counsel,) with instructions [to] bring suit in U. S. Circuit Court to foreclose the mortgage in your name.

"You will please refer Judge Ranney to Mess. King, Thompson & Maxwell, our att'ys, for any information required for the suit.

"Of course we bear all the expenses.

"Very resp't,

"(Signed) CHAS. B. FOOTE, *Pres.*"

"COMMERCIAL BANK, CINCINNATI, O., *Feb.* 20, 1880.

"Mess. Winslow, Lanier & Co., New York.

"GENTS: Your favor of the 19th inst. is at hand. I will thank you to send the note and mortgage of John Nash to Judge Ranney, of Cleveland, in accordance with the terms of my letter of the 10th of Dec.

"Very resp't,

"(Signed) CHAS. B. FOOTE, *Pres't.*"

In accordance with these directions the note and mortgage were sent to Mr. Ranney, who began this suit for the foreclosure March 19, 1880. Both Nash and his wife answered the bill, denying that the plaintiffs were the holders and owners of the note, and claiming that if they were they took them subject to all defences which would have been good against Colville, the payee and mortgagee, and that the amount realized from the sale of the property covered by the $7000 mortgage should be allowed as a credit on the other.

The Circuit Court sustained this defence and gave a decree accordingly. From that decree this appeal was taken.

The facts established by the evidence, taken together, show, as we think, that when the suit was begun Winslow, Lanier & Co. had such a title to and interest in the note and mortgage as gave them the right to sue therefor in their own names. They had actually discounted the note and placed the proceeds to the credit of the bank in their general account, and it does not appear that this credit had ever been cancelled when the suit was brought. But it is equally apparent that they are not either in law or equity entitled to protection as innocent holders for value against the defences of Nash and wife to the note and mortgage in the hand of Colville or the old bank. As between the old bank and the new we entertain no doubt that the new bank is to be treated in all respects as the successor of the old, taking the assets that were turned over as they stood and assuming the liabilities. All the knowledge of the old bank as to the rights of the parties to the securities transferred is chargeable in law on the new.

The transfer from the new bank to Winslow, Lanier & Co. shows on its face that it was not made in the usual course of business between a western bank and its New York correspondent. The note, which was originally for three years, and secured by mortgage, had less than thirty days to run, and was payable at the Cincinnati bank. It was not even indorsed by the bank in the usual way, but, instead, a formal guaranty of collection and payment, on a separate paper, was sent forward to take effect if the purchase was made. The letter accompanying the papers contained not a word of explanation,

and even before the maturity of the note the bank began to give directions in respect to the course to be taken for its collection, accompanied by a request that if payment was not made the note should not be charged back in account, but held "so that suit can be brought by you if necessary." These directions were continued after maturity, and so far as appears always followed, even to the time and manner of commencing suit. Under these circumstances we cannot look on Winslow, Lanier & Co. in any other light than as trustees for the bank, and proceeding for the collection on its account the avails to be credited when realized.

In this court it was claimed in argument that the transfer was collusive for the purpose of creating a case cognizable by the Circuit Court of the United States, and, therefore, should have been dismissed below under the authority of § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, but we find no sufficient evidence to justify us in reversing the decree and sending the suit back for a dismissal. The transfer was undoubtedly made for the purpose of putting it in the power of Winslow, Lanier & Co. to bring a suit, but this, for anything that now appears, might as well have been begun in a state as in a federal court. The object of the bank seems to have been not to give jurisdiction to the courts of the United States, but to create an ownership which would cut off the anticipated defences of the mortgagors. That of itself is not enough to make it proper for the courts of the United States to refuse to take jurisdiction if the title made by the transfer is complete, and such as will enable the assignee to maintain a suit in his own name at all. To justify a dismissal it must appear that the object was to create a case cognizable under the act of 1875.

This disposes of the whole case, and the decree is consequently

Affirmed.

LAUGHLIN *v.* MITCHELL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argued April 11, 1887. — Decided April 25, 1887.

In June, 1846, a sale took place, at public auction, under a deed of trust, of land in Mississippi, the property of M., the husband of the plaintiff, and on which they lived. The plaintiff's father bought the land at the sale. His daughter and her husband continued to live on it. The husband died in 1847, and in 1848 she married L., and they continued to live on the land. In 1858, she and L. and her father executed an instrument, by which her father leased the land to her for her life, in consideration of natural love and affection and $100, and which acknowledged that the sole legal and equitable title and the right of property in and to the land were in her father. Five months afterwards, she and her husband duly acknowledged the execution of the lease, and recorded it in the proper office. In 1869, her father made his will, devising the land to her for her life, and to a grandson, in fee, after her death; and died in 1870. In 1881, she brought this suit in equity against the grandson, to cancel the lease and set aside the devise to the grandson, on the ground that her father bought the land under a parol trust for her, and that her signature to the lease was obtained by duress: *Held*, that she was estopped from setting up the parol trust, and that no ground was shown for setting aside the lease.

In equity. Decree dismissing the bill, from which the complainants appealed. The case is stated in the opinion of the court.

Mr. Murray F. Smith for appellant. *Mr. Alfred B. Pittman* filed a brief for same.

Mr. Albert M. Lea for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity filed on the 25th of June, 1881, in the Circuit Court of the United States for the Southern District of Mississippi, by Florida Laughlin, the wife of Edmund C. Laughlin, against Joseph D. Mitchell, and also against Jeffer-

son Davis and Joseph H. D. Bowmar, as executors of the last will and testament of Joseph E. Davis, deceased.

The allegations of the bill are substantially as follows: The plaintiff is the owner and in possession of a plantation in Warren County, Mississippi, known as "Diamond Bend." She is a daughter of Joseph E. Davis, deceased. The defendant Mitchell is the grandson of Davis. Davis died in 1870, leaving a last will and testament, which was duly admitted to probate, in the proper court, in September, 1870. The will was executed on the 18th of March, 1869. Its second and third articles were as follows: "2d. I give and devise to my daughter, Florida Laughlin, the estate known as the Diamond Place, in said county of Warren, containing about one thousand two hundred acres, for and during her natural life, with full enjoyment of the profits and privileges thereunto belonging. 3dly. I give and devise to my grandson, Joseph D. Mitchell, the plantation known as the Diamond Place, in the county of Warren, containing about one thousand two hundred acres, now in possession of and occupied by my said daughter, Florida Laughlin, who has a life estate therein, with appurtenances thereunto belonging, on the death of my said daughter, Florida Laughlin, to hold and enjoy the same in fee simple; but in case my grandson, J. D. Mitchell, should not survive my daughter, Florida Laughlin, and should die without issue, I give and devise said Diamond Place to my nephew, Joseph E. Davis, son of Hugh R. Davis, of Wilkinson County, Mississippi." Davis became possessed of the property in question only through the plaintiff and as her trustee, under the following circumstances: On the 7th of June, 1844, the plaintiff was the wife of David McCaleb, and she and her husband were then living on the plantation, which had been his property before he married her. There existed a deed of trust of the property, given by McCaleb in 1837, the balance of the debt secured by which, amounting to $13,955.80, had been assigned to one Jacobs. In June, 1844, the plaintiff and her husband executed a new deed of trust to Chilton and Searles, as trustees, to secure the payment of said balance to Jacobs, covering the land and sundry slaves and personal

property. In May, 1846, the plaintiff and her husband executed another deed of trust, covering the same real and personal property, and some additional slaves, to one McElrath, as trustee, to secure a debt due by the husband to Laughlin, Searles & Co., the debt amounting to $4201.61 of principal. In addition, McCaleb owed other large, pressing debts. The property was then reasonably worth more than $100,000. Chilton and Searles advertised the property for sale under their deed of trust, at public outcry, on the 15th of June, 1846. Before that day, Jonathan McCaleb, the uncle of David McCaleb, had promised to purchase the property at the sale, to take the title to it in his own name, and to give to David McCaleb time to repay to his uncle such amount as he should advance to make the purchase. Accordingly, the uncle attended the sale, prepared to purchase the property, in trust, for the benefit of his nephew. The plaintiff's father had, however, in the mean time, at her solicitation, consented to purchase the property in trust for her, and to hold it so that she and her husband might in time be able to redeem it, the object being to make it secure from the creditors of her husband. On the day of the sale, her father and her husband's uncle being present, it was agreed that the purchase should be made by and in the name of her father, to be held for and sold to her on payment of such sum, with interest, as her father might be required to pay or assume, instead of being bid in by and in the name of her husband's uncle, to be redeemed in like manner by her husband. It was made known at the sale, to all present, that her father was bidding for her, and on that account no bidding was made by any disinterested persons, and, as a result, there was no substantial competition. All of the property, real and personal, was knocked off to her father as the highest bidder, at the sum of $28,531, which was scarcely more than one-third of its value. The creditors who were entitled to the proceeds consented that the purchase money should not be required to be paid in cash. The plaintiff was left in the undisturbed possession of the property, without the payment of any money, and her father executed his own note to Jacobs for the principal and interest of the debt to Jacobs,

including the expenses of the sale, the intention being that her husband might be able to meet such payment by the proceeds of the crops from the property. On the 15th of June, 1846, a written agreement was executed by Chilton and Searles, as trustees, by Joseph E. Davis, and by Jacobs, which recited the sale under the deed of trust to them, and that Davis had at the sale purchased the slaves and the land for $28,531, and conveyed the property to Davis, subject to the payment of a promissory note which he then gave for the amount of the debt due to Jacobs, the title to all the property to remain in the trustees until the payment of such debt, and then to vest absolutely in Davis, Davis to pay out of the balance of the purchase money the amount due to Laughlin, Searles & Co., under the deed of trust of May 7, 1846, and the remainder of the purchase money to go to David McCaleb. After these arrangements, David McCaleb continued the cultivation of the crops and exercised dominion over the property in like manner as if the title had been vested in the plaintiff instead of in her father for her use. Her father never during the lifetime of her husband, exercised any control over the property. No account was kept or demanded as to its rents, issues and profits, and the debts which had been so assumed by her father were considered by him and her husband as her debts, to be paid for by her husband by means of the property. Her husband treated the property as her separate estate, and shipped the crops during his lifetime, and applied the proceeds to the payment of the debts which had been assumed by her father, and of the other incumbrances. David McCaleb died in May, 1847, and she shipped the crops of that year, as the crop of the preceding year had been shipped, to agents, to the credit of Diamond Place account, for the Jacobs judgment. In July, 1848, she married Edmund C. Laughlin, her present husband. They continued to live on the plantation, shipping the crops as before, and applying the same, sometimes through their merchants and sometimes by direct payment to her father, to the discharge of said indebtedness. Some years after she had married Laughlin, and after she had paid a large portion of all the incumbrances, and some other

indebtedness, she requested her father to make a title to her, and allow her to secure to him any balance for which she might be liable. This request was not complied with by him, but his failure to do so was not accompanied or explained by his advancing any claim of beneficial interest in himself in the property. Her ownership of the property was repeatedly admitted by her father, both orally, and in letters addressed to her and subscribed by him. On more than one occasion he declared to her that he had devised the property to her by his will. Before the year 1858, she had more than repaid to her father all money and debts paid out and assumed by him for her on account of the property. On the 27th of December, 1858, when her father was just beginning to recover from a dangerous illness, and while he was feeble and nervous, he said to the plaintiff, who was then in attendance upon him, that he would like her husband to be sent for (he being then at Diamond Place, several miles away). When her husband arrived, he and the plaintiff were called into the office of her father, and a paper was put into her hands, which he desired her to read aloud. When she had read it, she found it was a lease to be signed by her and her husband, and by her father, in which her father leased the Diamond Place, and the slaves so purchased by him, to the plaintiff, for life. The lease, a copy of which is annexed to the bill, was signed by the three parties. It is dated December 27, 1858, and by it Davis, in consideration of natural love and affection and $100, leases to the plaintiff the plantation called Diamond Place, and certain slaves, horses, mules, colts, cattle, sheep and hogs, for the natural life of the plaintiff. There is a covenant by the plaintiff and her husband that they will manage the plantation and slaves in a proper and husbandlike manner, and at the termination of the lease will quietly surrender the plantation and property unto Davis, his heirs, executors, administrators and assigns, "in as good condition as the same now is, natural wear and tear and unavoidable accidents excepted, it being hereby acknowledged that the sole legal and equitable title in and to said plantation and slaves and other property is in the said party of the first part, and the right of property in him."

On becoming aware of the contents of the paper she was asked to sign, the plaintiff remonstrated with her father, and reminded him that at the trustees' sale of the property he had promised her that as soon as the debt which he had assumed, or would have to assume, was paid to him, he would make her a fee simple title to the place, and she said to him that, notwithstanding all he had ever paid out on the place had been repaid to him, he now wished her to take only a life estate in what she had thus bought and paid for, to which his only reply was, "I think it best for you." She signed the paper under compulsion, seeing the nervous and excited condition of her father, and fearing disastrous consequences to him, in his feeble state of health, if she should any longer oppose him. She and her husband afterwards acknowledged the deed or lease, on the 31st of May, 1859. The acknowledgment was extorted from them by threats on the part of Davis, if they did not acknowledge it, to take possession of the place and put an overseer on it, and leave to the plaintiff the bare occupancy of the house and garden, with no other provision. From the time the plaintiff was induced by her father to make such acknowledgment up to the time of his death, she expressed to him on all proper occasions, both in letters and personal interviews, her sense of the injustice which had been done to her. From the time she left her father's house, after executing the deed or lease, she never returned to it. After she had signed the instrument she always supposed that by that act she had finally and hopelessly lost her property, and whatever she has said or done or omitted to do since was under that belief. Prior to January 25, 1869, her father suggested to her husband that he should purchase the property at the price of $60,000 for the bare land and tenements, when the market value thereof was trifling compared with their value in June, 1846, when the same lands, with the slaves, sold for over $28,000. Joseph E. Davis, the son of Hugh R. Davis, who was the devisee, under the will, of the plantation in case Joseph D. Mitchell should not survive the plaintiff and should die without issue, is dead.

Such being the allegations of the bill, its prayer is, "that

the lease or instrument in writing whereby your oratrix conveyed her said property to Joseph E. Davis, or acknowledged that the right thereof was in him, be adjudged void and of no effect as against your oratrix; that the devise of said property in and by said will to the defendant Joseph D. Mitchell be decreed to be void; that the beneficial ownership and title to said property be decreed, as against said Joseph E. Davis, deceased, and his devisees, to be in your oratrix; that an account may be taken of the payments which were made by and for your oratrix in the premises, that it may be ascertained whether or not she has, in fact, paid to said Joseph E. Davis the full amount which she was bound to pay to entitle her to the relief hereby prayed, as she has hereinbefore alleged, your oratrix being willing and hereby offering to pay any balance which may be found against her, on such accounting, to the parties entitled thereto; and that, upon the ascertainment that your oratrix has fully paid all such sums as in equity she ought to have paid, or upon her payment thereof now, she may be decreed to have the absolute, indefeasible title of said property, as against said defendant."

The answer of the defendant Mitchell puts in issue all the material allegations of the bill on which the relief it claims is founded. It denies every averment setting up any arrangement, agreement, or understanding made by Joseph E. Davis with David McCaleb, or with Jonathan McCaleb, or with the plaintiff, for the purchase of the property in trust for the plaintiff, and alleges that Joseph E. Davis purchased the property at the sale in his own right, and thereby acquired the full beneficial and legal title thereto, and that he paid the full sum which he agreed to pay by the instrument of June 15, 1846. It alleges that David McCaleb and the plaintiff at all times recognized the ownership of Joseph E. Davis in the property, and were fully cognizant of the fact that although he purchased the property to save the plaintiff from being turned out of her home, he never contemplated giving her the fee in the property, or any other interest than a life estate, and that he did not keep or demand any account of the rents, issues, and profits of the plantation, because he was content that

the plaintiff should enjoy the usufruct of the property during her life, as appears by the lease and by the terms of his will. It denies that any crops were shipped for the account of the indebtedness to Jacobs, and denies that either McCaleb or the plaintiff ever paid to Joseph E. Davis any part of the $28,531 which constituted the purchase money of the property. It denies that the signature of the plaintiff or her husband to the lease, or their subsequent acknowledgment of it, was procured by the compulsion, threats, or other undue influence of her father, and alleges that the lease was intended by him as a provision for her, and as an assurance to her of a home for the remainder of her life.

A replication was filed to this answer and proofs were taken, and the case was heard, an order being entered dismissing the bill as to the executors of Joseph E. Davis.

The deposition of the plaintiff was taken as a witness in her own behalf, and afterwards, and at the hearing, the defendant made a motion to exclude the deposition, on the ground that she was not a competent witness. The court made a decree dismissing the bill, from which the plaintiff has appealed. In its opinion, 14 Fed. Rep. 382, it says: "It is admitted that the testimony of the complainant as to the understanding and agreement between her and her father, relating to the creation of the alleged trust, is incompetent, and cannot be considered."

The Circuit Court gives the following as a statement of undisputed facts in the case: "In the year 1846, David McCaleb, then the husband of complainant, was the owner of the land described in the bill, and the subject of this controversy. He was largely indebted, and before that time, had executed a mortgage or trust deed to secure a debt due to one Jacobs, in which complainant joined, conveying to the trustees, Chilton and Searles, this tract of land, with the slaves and personal property thereon. The trustees, having advertised the time and place of sale, proceeded, on the 15th of June, 1846, to offer the same for sale to the highest bidder for cash. There were present at the sale Jonathan McCaleb, an uncle of David McCaleb, who held a large debt against his nephew, and other creditors, or their counsel, who bid more or less for the prop-

erty sold; but the whole of it was either struck off to Joseph E. Davis, the father of complainant, or the bids were transferred to him, so that he became the purchaser, the aggregate amount of the sales being $28,531. Said Davis, so far as the creditors were concerned, continued to be the owner of the property; but David McCaleb and wife remained in possession of the property, as before the sale, up to McCaleb's death, which occurred about one year thereafter. Complainant remained in possession alone, up to her intermarriage with E. C. Laughlin, her present husband, and complainant and he have remained in possession ever since. On the 27th of December, 1858, Joseph E. Davis executed a lease or deed conveying said property, real and personal, to complainant for and during her natural life. This conveyance contained in it an acknowledgment that said Davis was the sole, legal, and equitable owner of the property conveyed. After being duly signed by said Davis, by complainant and her husband, it was delivered to complainant, and some five months thereafter it was duly acknowledged by complainant and her husband, and recorded in the proper office. Joseph E. Davis, by his last will and testament, duly probated and admitted to record, devised to the defendant, Joseph D. Mitchell, this land, described as 'Diamond Place,' then occupied by complainant, and in which, as declared by the will, she had a life estate."

As to the disputed facts in the case the court held that the trust alleged was not established by the evidence, aside from the testimony of the plaintiff, the view taken by it being, that the evidence established that Davis purchased the property with the purpose of letting the plaintiff and her husband remain on the plantation and control it and the property upon it, intending to hold the legal title to all of it and to make himself personally responsible for the expenses of the plantation, the income to be applied to pay those expenses and the personal expenses of his daughter and her husband, and the remainder of it to the payment of the purchase money for which he was personally liable, and intending, when this was done, to convey, or secure by his will, to her, a title to the property, it not very clearly appearing whether this was to be

in fee or only for life; that, after the plaintiff's marriage to Laughlin, she and her husband desired to obtain the legal title to the property, the plaintiff all the time recognizing the title to it as being in her father, and that it was incumbered for the payment of the balance of the purchase money to whomsoever it might be due; that this state of things continued until the execution of the lease; that the lease left the plaintiff in possession of the property for life, free from any obligation to pay any part of the debts of the place or the balance of the purchase money due; that the trust alleged was not established by clear and satisfactory evidence; that, even admitting the understanding between the plaintiff and her father at the time of the sale, as alleged in the bill, the demands referred to had not been satisfied at the time the lease was executed; that there was no fraud or deception or undue influence on the part of the plaintiff's father in respect to the execution of the lease by her or her husband; that, eight days after the execution of the lease, he gave her the option of returning it, and in that event proposed to leave her in possession of the house, garden and appurtenances, and an income, in place of the provisions of the lease; that, after waiting nearly five months and deliberating upon the proposition, and without any further influence upon the part of her father, so far as the evidence shows, and with ample time to consult counsel and friends, she and her husband, and not Mr. Davis, placed the lease on record in the proper office in Warren County, thus accepting its terms; and that they enjoyed its benefits, with no attempt to revoke it, until the filing of this bill on the 25th of June, 1881, more than twenty-two years after the execution, acknowledgment and recording of the lease, more than twelve years after Davis' will was made, and more than ten years after his death; and that it does not appear that any intimation was given to Davis, after the recording of the lease, of dissatisfaction with its terms, or that he was advised during his lifetime of any intention to assail it. The opinion of the Circuit Court says: "On the 18th day of March, 1869, Mr. Davis made his last will and testament, by which he devised the remainder interest in this real estate to the defend-

ant. Ten years thus elapsing after the lease was recorded by Mrs. Laughlin before Mr. Davis made his will, he was justified in the belief that he had the right and power to devise this remainder interest to whom he pleased, and for this reason, if there were no other, I am of opinion that complainant is estopped from assailing this lease now, and is not entitled to have the same declared void, and a cloud upon her title. She was fully cognizant of all the facts in relation to her title and in relation to the execution of the instrument, during the lifetime of her father as well as since. To wait until after his death, and until after the death of most of the persons who could have had any knowledge of the transactions, and after her father, by will, had disposed of his estate, presumably, in some respects, in a manner otherwise than he would have done had he not believed himself possessed of this property, and then attack his will, would be inequitable and unjust."

On the whole case we are of opinion, that, even regarding the deposition of the plaintiff as competent testimony under § 858 of the Revised Statutes, she is estopped by her action in respect to the acknowledgment of the lease, and placing it on record, and permitting it thus to remain unquestioned for over twenty-two years, from setting up the parol trust alleged in regard to the property; that no ground is shown for setting aside the lease; and that the decree of the Circuit Court must be

Affirmed.

CARSON *v.* DUNHAM.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

Submitted March 28, 1887. — Decided April 25, 1887.

When a case is removed from a state court to a Circuit Court of the United States on the ground that the controversy is wholly between citizens of different states, and the adverse party moves in the Circuit Court to remand the case, denying the averments as to citizenship, the burden is on the party at whose instance the suit was removed to establish the citizenship necessary to give jurisdiction to the Circuit Court.

A petition filed in a state court, showing on its face sufficient ground for the removal of the cause to a Circuit Court of the United States, may be amended in the latter court by adding to it a fuller statement of the facts, germane to the petition, upon which the statements in it were grounded.

In order to give jurisdiction to a Circuit Court of the United States of a cause by removal from a state court, under the removal clauses of the act of March 3, 1875, c. 137, it is necessary that the construction either of the Constitution of the United States, or of some law or treaty of the United States, should be directly involved in the suit; but the jurisdiction for review of the judgments of state courts given by § 709 of the Revised Statutes extends to adverse decisions upon rights and titles claimed under commissions held or authority exercised under the United States, as well as to rights claimed under the Constitution laws or treaties of the United States.

Provident Savings Society v. *Ford*, 114 U. S. 635; *Dupasseur* v. *Rochereau*, 21 Wall. 130; and *Crescent City Live-Stock Co.* v. *Butchers' Union Co.*, 120 U. S. 141, distinguished.

A mortgage made in enemy's territory to a loyal citizen of the United States does not necessarily imply unlawful intercourse between the parties, contrary to the non-intercourse proclamation and act.

A petition for the removal of a cause from a state court should set out the facts on which the right is claimed; not the conclusions of law only.

This was an appeal from an order of a Circuit Court remanding a case to the state court from which it had been removed. The case is stated in the opinion of the court.

Mr. Clarence A. Seward and *Mr. James Lowndes* for appellant. *Mr. A. G. Magrath* and *Mr. H. E. Young* also filed a brief for same.

Mr. William E. Earle for appellee.

Mr. Chief Justice Waite delivered the opinion of the court.

This is an appeal under § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, from an order of the Circuit Court remanding a suit which had been removed from a state court. The record shows that on the 11th of August, 1886, C. T. Dunham, the appellee, filed a bill in equity in the Court of Common Pleas of Berkeley County, South Carolina, against Caroline Carson, to foreclose a mortgage made by William McBurney

and Alfred L. Gillespie to Edmund Hyatt, which had been assigned to Dunham. Is is alleged that Mrs. Carson is in possession of the mortgaged property, and that she and the plaintiff are the only necessary parties to the suit. Service was made on Mrs. Carson by publication, for the reason, as shown by affidavit, that she did not reside in South Carolina, but in Rome, Italy. On the 9th of October, 1886, which was the day service on her was completed, she entered her appearance by counsel, and at the same time filed her petition for the removal of the suit to the Circuit Court of the United States for the District of South Carolina, on the following grounds:

"I. That all the matters therein have been already adjudged in her favor by the Circuit Court of the United States for the District of South Carolina.

"II. That the complainant is barred of his present action by a judgment of the said court in her favor on the matter in controversy.

"III. That this court is without jurisdiction because a prior suit on the like matter is pending in the aforesaid court of the United States, which, by its receiver, has possession of the subject matter of this suit.

"IV. That the bond and mortgage sued on are void under the laws of the United States.

"V. That the defendant holds title to Dean Hall plantation, the property involved in this suit and mentioned in the complaint in the above-entitled suit, under an authority exercised under the United States, to wit, under a conveyance from the United States marshal for the district of South Carolina, made under a decree of the United States Circuit Court, for the said district, all of which will more fully appear by her answer.

"The controversy in said suit is also wholly between citizens of different states, viz., between the said C. T. Dunham, who, as your petitioner is informed and avers, was, at the commencement of said suit, and now is, a citizen of the state of South Carolina, and your petitioner, who was, at the commencement of said suit, and now is, a citizen of the state of Massachusetts; or the controversy in said suit is wholly be-

tween Mary A. Hyatt, who was, at the commencement of said suit, and now is, a citizen of the state of New York, and who is the sole and only real party in interest in said suit and in said controversy, and your petitioner, who was, at the commencement of the said suit, and now is, a citizen of the state of Massachusetts, and which controversy is the only controversy in said suit; that the said Mary A. Hyatt is the real party plaintiff in said suit, and the said C. T. Dunham is but a nominal and colorable plaintiff, and that his name has been used merely for the purpose of defeating the jurisdiction of the Circuit Court of the United States for the District of South Carolina, and that said suit is, in fact, a controversy wholly between the said Mary A. Hyatt and your petitioner, notwithstanding the assignment to the said C. T. Dunham in the complaint in said suit mentioned."

The suit was entered in the Circuit Court on the 26th of October, 1886, and the next day Mrs. Carson filed in that court an answer to the bill, in which she set up title in herself to the mortgaged property by reason of a purchase at judicial sale under a decree of the Circuit Court of the United States, affirmed by this court, *McBurney* v. *Carson*, 99 U. S. 567, in a suit for the foreclosure of a mortgage belonging to her superior in lien to that in favor of Hyatt. The particulars of her title, as stated in the answer, will be found reported in *Carson* v. *Hyatt*, 118 U. S. 279, decided by this court at the last term. The claim is that Dunham is estopped by this foreclosure from denying the validity of the mortgage held by Mrs. Carson, and its priority in lien to that on which this suit was brought.

The answer also sets up as a bar to this suit a decree in the suit of *Carson* v. *Hyatt*, *supra*, after it was removed to the Circuit Court of the United States under the order of this court, dismissing the bill on the discontinuance of the complainant therein from whom Dunham claims title by assignment since the rendition of that decree.

The answer also contains these further defences:

"XVII. The defendant avers that a suit is now pending in this court wherein all the issues involved in this action are

raised; that the said suit was begun before this present suit, and that this court obtained jurisdiction thereof before any court obtained jurisdiction of this present suit, and she says that by reason of the said suit the court of Common Pleas of Berkeley County then had and now has no jurisdiction of this action.

"XVIII. When the bond and mortgage which the complainant is seeking to enforce were executed to the said Edmund Hyatt the said Edmund Hyatt was a citizen and a resident of the state of New York, a loyal state, and the obligors of the said bond, and the makers of the said mortgage, were citizens of the state of South Carolina, which was then in rebellion against the United States; and this defendant avers that the said bond and mortgage were void under the laws of the United States."

On the 11th of November Dunham filed in the Circuit Court an answer to the petition of Mrs. Carson for removal, in which he denied that he was a citizen of South Carolina, and averred that he was a citizen of the same state with her, namely, Massachusetts. The issue made by this answer was set down for trial in the Circuit Court, accompanied by an order "that on such trial the burden shall be upon the defendant, Caroline Carson, to show that the plaintiff, C. T. Dunham, is not a citizen of Massachusetts."

Upon this trial it was substantially admitted that Dunham was at the commencement of the suit a citizen of Massachusetts, and thereupon the suit was remanded. From an order to that effect this appeal was taken.

The Circuit Court did not err in holding that the burden of proof was on Mrs. Carson to show that Dunham was not a citizen of Massachusetts. As she was the actor in the removal proceeding, it rested on her to make out the jurisdiction of the Circuit Court. Dunham having denied that he was a citizen of South Carolina, as she had stated in her petition, and having claimed that he was in fact a citizen of Massachusetts, the same as herself, the affirmative was on her to prove that his claim was not true, or, in other words, that he was a citizen of another state than her own. The fact

that the suit had actually been entered in the Circuit Court did not shift the burden of proof. It was decided in *Stone* v. *South Carolina*, 117 U. S. 430, that all issues of fact made on a petition for removal must be tried in the Circuit Court. The matter stood for trial in the Circuit Court, therefore, precisely the same as it would if the law had required the petition for removal to be filed there instead of in the state court, and Mrs. Carson had been called on to prove the facts on which her right of removal rested. The evidence showed conclusively that Dunham was a citizen of the same state with Mrs. Carson, and consequently the suit was properly remanded so far as that ground of removal was concerned.

The fact, if it be a fact, that the assignment of the mortgage to Dunham was colorable only, and made for the purpose of preventing the removal, gives the Circuit Court no right to take jurisdiction. That was decided in *Provident Savings, &c., Society* v. *Ford*, 114 U. S. 635, followed and approved in *Oakley* v. *Goodnow*, 118 U. S. 43.

The important question is, therefore, whether it sufficiently appears that the suit is one "arising under the Constitution or laws of the United States." In *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 199, 203, it was decided that, "before a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statements of facts, 'in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty, of the United States." When this suit came into the Circuit Court from the state court, no such case had been made out. As was further said in the case just cited, "the office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises." All the statements of this petition, which, for the purpose of removal, performs the office of pleading, are mere conclusions of law, not facts from which the conclusions are to be drawn. If the case had stood on the bill and petition for removal alone,

there could be no doubt of the propriety of the order to remand on this ground as well as on that of citizenship.

But after the case got into the Circuit Court, an answer was filed which did state the facts from which, it is claimed, the conclusions of law set out in the petition necessarily followed. The petition, on its face, made a case for removal by reason of the citizenship of the parties; and the suit was properly taken from the state court and entered in the Circuit Court on that ground, if not on the others. The statute made it the duty of the state court to proceed no further until its jurisdiction had in some way been restored. Had it proceeded, its judgment could have been reversed, because, on the face of the record, its jurisdiction had been taken away.

The suit was, therefore, rightfully in the Circuit Court when the record was entered there and when the answer was filed, which, for the purposes of jurisdiction, may fairly be treated as an amendment to the petition for removal, setting forth the facts from which the conclusions there stated were drawn. As an amendment, the answer was germane to the petition, and did no more than set forth in proper form what had before been imperfectly stated. To that extent, we think, it was proper to amend a petition which, on its face, showed a right to the transfer. Whether this could have been done if the petition, as presented to the state court, had not shown on its face sufficient ground of removal, we do not now decide.

Before considering further this branch of the case it is proper to notice the difference between the provisions of the act of 1875 for the removal of suits presenting Federal questions, and those in § 709 of the Revised Statutes for the review by this court of the decisions of the highest courts of the states. Under the act of 1875, for the purposes of removal, the suit must be one "arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority;" that is to say, the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction. *Starin* v. *New York*, 115

U. S. 248, 257, and cases there cited. But under § 709 there may be a review by this court of the decisions of the highest courts of the states in suits "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party under such constitution, treaty, statute, commission, or authority." For the purposes of a removal the Constitution, or some law or treaty of the United States, must be directly involved, while for the purposes of review it will be enough if the right in question comes from a "commission held, or an authority exercised under, the United States." Cases, therefore, relating to the jurisdiction of this court for review are not necessarily controlling in reference to removals.

This distinction was pointed out and acted on in *Provident Savings, &c., Society* v. *Ford*, 114 U. S. 635, where the suit was brought in a state court of New York on a judgment in the Circuit Court of the United States for the Northern District of Ohio, and an attempt was made to remove it under the act of 1875, on the ground, among others, that "a suit on a judgment recovered in a United States court is necessarily a suit arising under the laws of the United States, as much so as if the plaintiff or defendant were a corporation of the United States;" but it was decided otherwise, (p. 642,) because a suit on such a judgment is "simply the case of an ordinary right of property sought to be enforced," unless some question is raised "distinctly involving the laws of the United States." "These considerations," it was further said, "show a wide distinction between the case of a suit merely on a judgment of a United States court and that of a suit by or against a United States corporation." The expressions in the opinions in *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134, and *Crescent City Live-Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 146, relied on by the counsel for the appellants, and which are thought to be in conflict with this, must be read and construed with reference to the facts of those cases, which came here from the courts of states for review under § 709 of the Revised Statutes.

What we have quoted above from *Provident Savings, &c., Society* v. *Ford* is equally applicable to the case made on this record. The answer sets up as a defence to the suit the decree in *Hyatt* v. *Carson*, and the title acquired by the purchase under the authority of the sale in *Carson* v. *McBurney*. It is an attempt to enforce an ordinary property right, acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question "distinctly involving the laws of the United States." The suit, therefore, as now presented, is not one arising under the Constitution and laws of the United States, within the meaning of that term as used in the removal act of 1875; but if, in deciding the case, the highest court of the state shall fail to give full effect to the authority exercised under the United States, as shown by the judgments and decrees of their courts, relied on to support the title of Mrs. Carson, its decision in that regard may be the subject of review by this court under § 709. The petition for the removal and the answer, taken together, set up and claim in her behalf a right derived from an authority exercised under the United States, but not necessarily under the laws of the United States, within the meaning of that term as used in the removal act.

What has been said in reference to the claims under the decrees in the Circuit Court is equally applicable to the allegation in the answer of the pendency of another suit on the same cause of action in the same court.

The statement in the answer that when the mortgage to Hyatt was made he was a citizen and resident of New York, and the makers of the mortgage citizens of South Carolina, a state whose people were then in rebellion against the United States, is not enough to make a suit arising under the Constitution or laws of the United States. The fact that a mortgage was made in enemy territory to a loyal citizen of the United States does not necessarily imply unlawful intercourse between the parties contrary to the proclamation of the President of the date of August 16, 1861, 12 Stat. 1262, under the authority of the act of July 13, 1861, c. 3, § 5, 12 Stat. 257. That transactions within Confederate lines affecting loyal cit-

izens outside were not all unlawful was decided in *United States* v. *Quigley*, 103 U. S. 595. To make a case for removal the answer should have set forth the facts which rendered the mortgage void under the non-intercourse act and the proclamation thereunder. There has been no attempt to do this.

The order remanding the case is

Affirmed.

Mr. Justice Blatchford took no part in the decision of this case.

MILWAUKEE AND NORTHERN RAILWAY COMPANY *v.* BROOKS LOCOMOTIVE WORKS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

Argued April 15, 1887. — Decided April 25, 1887.

On the facts found by the court below, this court holds that the fund in dispute in this case is subject to be applied, by virtue of the garnishee proceedings, to the payment of the judgment debt due to the defendant in error from the plaintiff in error.

The case is stated in the opinion of the court.

Mr. E. Mariner for plaintiff in error.

Mr. F. C. Winkler for defendant in error. *Mr. James G. Jenkins* was with him on the brief.

Mr. Justice Matthews delivered the opinion of the court.

The Brooks Locomotive Works, on November 30, 1875, recovered a judgment against the Milwaukee and Northern Railway Company for the sum of $15,368.72, with interest and costs, in the Circuit Court of the United States for the Eastern District of Wisconsin. Execution thereon having been returned not satisfied, and the judgment being otherwise

unpaid and still in force, on July 7, 1879, the plaintiff below filed what under the laws of Wisconsin regulating the practice in such cases is called an affidavit of garnishment, in which it was alleged that the defendant, the Milwaukee and Northern Railway Company, had not property liable to execution sufficient to satisfy the plaintiff's demand, and that the Wisconsin Central Railroad Company, a corporation of the state of Wisconsin, and Charles L. Colby, Edwin H. Abbot, and John A. Stewart, were indebted to or had property, real or personal, in their possession, or under their control, belonging to the defendant in said execution. Summons was accordingly issued, pursuant to said affidavit, against the garnishees, and served on the Wisconsin Central Railroad Company, C. L. Colby, and Edwin H. Abbot, as well as upon the defendant, the Milwaukee and Northern Railway Company. The defendants filed answers, Edwin H. Abbot answering under oath for himself and John A. Stewart, a citizen of New York, jointly. In this answer Stewart and Abbot set out particularly the circumstances under which they allege that they hold the sum of $28,258.44 as an amount due from them, as trustees for the mortgage bondholders of the Wisconsin Central Railroad Company, for the use and occupation of the railroad of the Milwaukee and Northern Railway Company while operated by them as such trustees; and, being in doubt as to whether the facts stated cast any liability upon them as garnishees, submit the question of their liability to the court. The other garnishees in their answers deny any indebtedness to the Milwaukee and Northern Railway Company.

The cause, having come on for trial upon these issues, was submitted to the court, the intervention of a jury being duly waived. The findings of fact and conclusions of law are as follows:

"First. That on the 30th day of November, 1875, the plaintiff above named duly recovered a judgment in this court against the Milwaukee and Northern Railway Company, defendant herein, for the sum of $15,368.72, damages and costs; that said judgment is still in full force and wholly unpaid and unsatisfied; that there is now due thereon from said defend-

ant, the Milwaukee and Northern Railway Company, to said plaintiff, the said sum of $15,368.72, with interest at the rate of seven per cent. per annum from the 30th day of November, 1875, amounting at this date to the sum of $23,410.40; and that said judgment was rendered upon certain promissory notes given by said company to the plaintiff upon the sale of an engine furnished for its railroad on the 6th day of September, 1873; that an *alias* execution was duly issued out of and under the seal of this court to the marshal of the Eastern District of Wisconsin upon said judgment on the 7th day of July, 1879, and while the same was in the hands of the said marshal, and wholly unsatisfied, and before the return day thereof, to wit, on the 7th day of July, 1879, this action was commenced, by due service of the garnishee affidavit and summons herein, upon the said defendant and upon the garnishees named in the title of this cause.

"Second. That the Wisconsin Central Railroad Company was, at said last-named date, and for many years prior thereto had been, and at all times hereinafter mentioned was, a corporation created by and under the laws of the state of Wisconsin, and owned and operated a railroad from Menasha, in the state of Wisconsin, to Ashland, on Lake Superior, in said state; that the defendant, the Milwaukee and Northern Railway Company, was during said times a corporation created by and under the laws of the state of Wisconsin, and owned a certain main line of railway extending from the city of Milwaukee, in the state of Wisconsin, to the city of Green Bay, in said state, and a spur line from Hilbert Junction, on said main line, to Menasha aforesaid; that the said Wisconsin Central Railroad Company, on the first day of July, 1871, mortgaged its line of railway aforesaid to secure certain bonds therein mentioned, which mortgage was in the usual form of railway mortgages, and authorized the trustees, upon default, to take possession of said railway, and that at all times hereinafter mentioned, the defendants, John A. Stewart and Edwin H. Abbot, were the trustees under said mortgage.

"Third. That the Milwaukee and Northern Railway Company, prior to the times hereinafter mentioned, had duly mort-

gaged its said line of railway to secure its bonds, in the usual form of railway mortgages, with authority upon the part of the trustees in said mortgage named to take possession of said railway upon default in the payment of the principal or interest of the bonds thereby secured, and that at the times hereinafter mentioned Jesse Hoyt and A. Warren Greenleaf were the trustees in said mortgage named, a copy of which mortgage is hereto annexed, marked 'Exhibit A.'

"Fourth. That on the 9th day of November, 1873, the Milwaukee and Northern Railway Company leased to the Wisconsin Central Railroad Company its line of railway and appurtenances, motive power and rolling-stock, railroad materials, and supplies of every description for the term of 999 years from and after November 30, 1873, a copy of which lease is hereto annexed, marked 'Exhibit B;' that by supplemental agreements to said lease, of which 'Exhibits C and D,' hereto annexed, are copies, Jesse Hoyt was substituted as trustee in the place of the Wisconsin Marine and Fire Insurance Company Bank, and that said lease was on or about January 8, 1878, by said Milwaukee and Northern Railway Company, assigned to Jesse Hoyt and A. Warren Greenleaf, trustees under said mortgage, of which the Wisconsin Central Railway Company had notice, copies of which assignment and notice are hereto annexed, marked 'Exhibits E and F;' that the Wisconsin Central Railway Company entered into possession of said road under said lease, and continued therein until the garnishees herein, Stewart and Abbot, took possession of said railway in January, 1879, and said company paid rent under said lease.

"Fifth. That at the times herein mentioned Jesse Hoyt was the president of the Milwaukee and Northern Railway Company, and Angus Smith was the vice-president thereof.

"Sixth. That on the 9th day of January, 1875, a foreclosure of the mortgage made by the Milwaukee and Northern Railway Company was commenced in this court by Jesse Hoyt, surviving trustee, against the Milwaukee and Northern Railway Company and the Wisconsin Central Railway Company, defendants, but that no receiver was appointed therein until

the 28th day of April, 1879, on which day the said court, by consent of the parties to said suit, made an order annulling such lease, and appointing James C. Spencer receiver, who qualified as such receiver on the fifth day of May, 1879, a copy of which order is hereto annexed, marked 'Exhibit G,' and that said trustees had never taken possession of said railroad and property under said mortgage, nor claimed so to do, until the appointment of said receiver.

"Seventh. That on the 12th day of October, 1875, one James Ludington recovered a judgment at law, in the Circuit Court of the state of Wisconsin for the county of Milwaukee, against the Milwaukee and Northern Railway Company, and on the 15th day of November, 1875, caused an execution to be issued thereon, which was returned *nulla bona* on the 18th day of January, 1876, which judgment was rendered upon default and without any appearance of the defendant therein, and the process commencing said action was served only upon Guido Pfister, a director of said company, and upon no other officer or person.

"Eighth. That on the 17th day of November, 1875, the said James Ludington filed a bill in equity in said Circuit Court for the county of Milwaukee founded upon his said judgment at law, and on the 27th day of December, 1875, obtained a decree therein, directing the sale of the railroad of the Milwaukee and Northern Railway Company thereunder; that on the 4th day of March, 1876, under said decree, the sheriff of the county of Milwaukee sold said railroad to Guido Pfister, and on the 29th day of March, 1876, executed a deed thereof to him, but did not make a report of the sale to the court until January 30, 1880, and said sale was confirmed by the court on the 9th day of February, 1880, and that the sheriff's deed to Guido Pfister was recorded in the office of the register of deeds of the county of Milwaukee on the 26th day of February, 1880, but said Pfister never took or claimed possession under said deed.

"Ninth. On the 4th day of January, 1879, the defendants, John A. Stewart and Edwin H. Abbot, as trustees under the mortgage of the Wisconsin Central Railroad Company, said

company having theretofore made default under said mortgage, and then being so in default, duly took possession of said Wisconsin Central railroad under the said mortgage, and also took possession of the Milwaukee and Northern railway, and thereupon notified the Milwaukee and Northern Railway Company and Jesse Hoyt, trustee of the mortgage of said company, and trustee under its said lease to the Wisconsin Central Railroad Company, and as assignee of said lease, of the taking of such possession of the Milwaukee and Northern railway, and notifying that they declined to assume, affirm, or in any way ratify the lease thereof to the Wisconsin Central Railroad Company, and notifying that, unless said parties notified should otherwise elect, they would continue to operate said Milwaukee and Northern railway temporarily and for such compensation as that service might fairly be worth, and requesting a personal interview to ascertain their wishes and with a view to a more permanent arrangement, and offering to submit to the parties in interest any proposition which could be jointly recommended with reference to the future possession of said railway, of which notice 'Exhibit H,' hereto annexed, is a copy; that the said Milwaukee and Northern Railway Company, or Jesse Hoyt as president or as trustee, or as assignee of said lease, did not, nor did either of them, in any way object to the possession of said railroad by said Stewart and Abbot, or give any attention to said notice until the commencement of negotiations in March, 1879, but said Stewart and Abbot continued to use and operate the Milwaukee and Northern railway without further arrangement or agreement, and without any objection by any of the parties to this proceeding, and with the acquiescence of the Wisconsin Central Railroad Company, but without any assignment of the lease, until the 1st day of May, 1879, and until the lease from the receiver as hereinafter found; and said Milwaukee and Northern Railway Company and said Jesse Hoyt, shortly before the 1st day of May, 1879, in the presence and with the concurrence of all others interested, including the Wisconsin Central Railroad Company, had negotiations with them which culminated in an arrangement by which a receiver

of the Milwaukee and Northern railway was appointed in the foreclosure suit, as hereinbefore found; that said Stewart and Abbot then entered into a lease with said receiver of said Milwaukee and Northern railway for a certain term commencing on the 1st day of May, 1879; that on or about the 23d day of July, 1879, after the service of the garnishee affidavit and summons herein, it was arranged and agreed between said Stewart and Abbot, trustees, on the one part, and Jesse Hoyt, as trustee and assignee, upon the other part, that the sum of $28,258.44 was the amount properly payable by the said Stewart and Abbot as trustees to the party lawfully entitled to receive the same out of the moneys received by said trustees from the operation of the Milwaukee and Northern railway from January 3, 1879, to May 1, 1879, and for the use thereof, which amount was a less sum than would have been coming by the terms of the lease to the Wisconsin Central railroad, and that thereupon said Stewart and Abbot paid to said Jesse Hoyt, as such trustee and assignee, the said sum of money upon receiving a bond of indemnity executed by Ephraim Mariner, Guido Pfister, and Angus Smith, indemnifying them against this suit by reason of such payment, copies of which agreement of accounting and bond of indemnity are hereto annexed, marked 'Exhibits I and J.'

"Tenth. That on the 8th day of March, 1880, an order was made in the foreclosure suit of the mortgage of the Milwaukee and Northern Railway Company for the sale of said railroad, which sale took place on the 5th day of June, 1880, and was sold to Ephraim Mariner and Guido Pfister as trustees for the holders of the bonds under said mortgage; that on the 9th day of June the report of said sale was filed, and was confirmed by the court, and that thereafter, on the 3d day of July, 1880, the final report of the receiver was filed, asking for a discharge, and said report was confirmed on the 5th day of July, 1880.

"Eleventh. That from January 3, 1879, to May 1, 1879, the said Stewart and Abbot were not in possession of or operating said Milwaukee and Northern railway under any lease

whatever between them and James C. Spencer as receiver of the Milwaukee and Northern railway, as claimed in the answer of the principal defendant herein, nor was the indebtedness of said garnishees for the use and occupation of said railroad during said period owing by them to said James C. Spencer, receiver.

"*Conclusions of Law.*

"The contention in this case being as to who was entitled to the sum of $28,258.44, agreed upon as the fair compensation for the use of the Milwaukee and Northern railway from January 3 to May 1, 1879, we find:

"First. That it did not belong to and cannot be rightfully claimed by the receiver appointed in the foreclosure suit of the mortgage on the Milwaukee and Northern railway, for the reason that he was not qualified as receiver until a subsequent date, and had never reduced the property to possession, and was only receiver of the mortgaged property.

"Second. That said fund did not belong to the Wisconsin Central Railroad Company, because such occupation and operation of the road by Stewart and Abbot, trustees, were with its acquiescence, and it is upon record in this cause as denying all indebtedness to the principal defendant herein, and makes no claim to said fund.

"Third. That said fund did not belong to Jesse Hoyt as trustee under said mortgage, because said trustee had not taken possession of said railroad, and was not entitled to the income thereof; that it did not belong to said Jesse Hoyt as trustee under said lease, or as assignee of said lease, because the occupation and operation of said road by Stewart and Abbot, trustees, was not under said lease, but in defiance thereof and in opposition thereto.

"Fourth. That said sum was, at the time of the garnishee proceedings herein, the property of the Milwaukee and Northern Railway Company, and was liable to be taken and attached for the debts due by said company; that the plaintiff, by virtue of the garnishee proceedings herein upon Stewart and Abbot, trustees, acquired a lawful claim and lien upon said fund to

the extent of the plaintiff's judgment and debt against said company, and that at the time of said garnishment the said John A. Stewart and Edwin H. Abbot had in their hands belonging to the defendant, the Milwaukee and Northern Railway Company, and were indebted to and owed said company for the use and occupation by said Stewart and Abbot of the railway of said company from January 3, to May 1, 1879, the sum of $28,258.44, and that the plaintiff is entitled to judgment against said Stewart and Abbot for the said amount due upon its judgment, to wit, the sum of $23,410.40; that as to the garnishees, the Wisconsin Central Railroad Company and Charles L. Colby, this action should be dismissed.

"Let judgment be entered herein in favor of the plaintiff against John A. Stewart and Edwin H. Abbot for the sum of $23,410.40, with costs to be taxed.

"Dated May 21, 1883.

"John M. Harlan, *Circuit Justice.*
"Chas. E. Dyer, *Dist. Judge.*"

Judgment having been entered for the plaintiff below, separate writs of error have been prosecuted by the Milwaukee and Northern Railway Company and by Stewart and Abbot.

The main contest in the case is between the plaintiff and Jesse Hoyt. If the fund in the hands of the garnishees, Stewart and Abbot, belongs to the Milwaukee and Northern Railway Company, the plaintiff is entitled to subject it to the payment of his judgment; otherwise not. Hoyt's claim is, that Stewart and Abbot, as trustees of the Wisconsin Central Railroad Company, were in possession of the Milwaukee and Northern Railway under a lease of that road to the Wisconsin Central Railroad Company, and are indebted to him, as trustee under that lease and as assignee of the lease, for the rent accruing under it, represented by the fund in their hands. The lease was executed on November 8, 1873, and was for the term of 999 years from that date. It stipulated that the Wisconsin Central Railroad Company, the lessee, should pay as rent a certain proportion of the gross earnings received from the demised road, instalments of which were to be paid monthly

to such trustee as should be, from time to time, jointly selected by the parties, "upon the trust to keep the same until the next instalment of interest is due upon the bonds issued by the first party under their first mortgage, and then to apply the same, or so much thereof as shall be necessary, to the payment of said interest when and as payable, and, if any surplus remain after payment of said interest, to pay the same to the first party, its successors and assigns, unless said surplus, or some part thereof, is due to the second party for advances, as is hereinafter provided, made to or for the benefit of the first party to pay said interest, and if said surplus, or any part thereof, is so due, then to said second party, as hereinafter provided, so much as is due for said advances and interest."

The Wisconsin Marine and Fire Insurance Company Bank was appointed trustee under the lease. By a supplemental agreement, made June 1, 1875, between the parties, the lease was modified so that the rent reserved for the three years from June 1, 1875, should be forty per cent. of the gross earnings received from the demised premises, and after that, so much as was necessary to pay the interest coupons of the Milwaukee and Northern Railway Company, not to exceed forty per cent. of the gross earnings. Under that modified lease, Jesse Hoyt was appointed temporary trustee, in place of the Wisconsin Marine and Fire Insurance Company Bank, for the period of twelve months, which appointment was continued by a further agreement made October 10, 1876.

On January 7, 1878, the Milwaukee and Northern Railway Company made a written assignment to Jesse Hoyt and A. Warren Greenleaf, trustees of the mortgage given to secure its bonds, of the lease of the Milwaukee and Northern railway to the Wisconsin Central Railroad Company, and of all the covenants therein contained, and of all moneys due or to grow due thereon, upon the same trusts, however, as were expressed in the trust deed executed by the Milwaukee and Northern Railway Company to Hoyt and Greenleaf as security for the first mortgage bonds of said company. On the following day a written notice, signed by Hoyt and Greenleaf, was served upon the Wisconsin Central Railroad Company of the fact of

such assignment, and directing that company to pay the rent to Jesse Hoyt as theretofore, "such assignment being intended merely as further security for said bonds, and not to disturb the relations of the parties to such lease and modifications." In the meantime, as appears by the sixth finding of facts, Jesse Hoyt, as surviving trustee under the mortgage made by the Milwaukee and Northern Railway Company, had commenced proceedings to foreclose the mortgage, the Wisconsin Central Railroad Company being a defendant thereto, which proceedings were pending when the garnishees, Stewart and Abbot, as trustees under the mortgage of the Wisconsin Central Railroad Company, entered into possession of the property of that company, and also took possession of and operated the Milwaukee and Northern Railroad, under the circumstances stated in the ninth finding of facts.

It is now contended, in opposition to the third conclusion of law drawn by the Circuit Court, that upon the facts found the garnishees, Stewart and Abbot, took possession of the Milwaukee and Northern Railway under the lease of that road to the Wisconsin Central Railroad Company, and became bound thereby to pay rent therefor to Hoyt, as trustee under said lease, or as assignee of said lease. Hoyt is not a party to this proceeding, but it is competent for Stewart and Abbot, as garnishees, to represent his rights in their own defence; for, if in law they are liable to Hoyt, they are not liable to the present defendant in error, and in protecting their own interests it is proper for them to assert the right of Hoyt if they are in law liable to him.

There are, however, two answers to the claim put forward on behalf of Hoyt. If the rent of the Milwaukee and Northern railway is payable to him, either as trustee under the lease or as assignee of the lease, it is not due to him in his own right, but merely for the purposes and upon the trusts expressed either in the lease or in the assignment. Those purposes and trusts were to apply the rents to be received by him to the payment of the interest coupons as they became due upon the mortgage bonds of the Milwaukee and Northern Railway Company secured by the mortgage to him; but it no-

where appears in the record that there are any coupons in arrears to which this rent could be applied, and in that event the rent is payable to the Milwaukee and Northern Railway Company as lessor beneficially interested. It in fact appears by the tenth finding, that pending this suit, and before its trial, the Milwaukee and Northern Railway was sold under the proceedings to foreclose the mortgage of which Hoyt was the surviving trustee, to trustees for the holders of the bonds under that mortgage, which sale has been duly confirmed by the court. It does not, therefore, appear but that at the time of the trial of this case all the bonds, with the interest thereon, of the Milwaukee and Northern Railway Company secured by the mortgage of which Hoyt was trustee, had been fully paid and satisfied. If so, Hoyt had no further interest under the lease, either as trustee or assignee, which entitles him to receive the fund in the hands of the garnishees for any purpose.

In the second place, however, it does not follow as a conclusion of law, from the ninth finding of facts, taken in connection with the other facts found, that Stewart and Abbot entered into possession of the railroad of the Milwaukee and Northern Railway Company under the lease of that road to the Wisconsin Central Railroad Company, and thereby became bound to pay the rent reserved therein. They were not assignees of the term of the Wisconsin Central Railroad Company under that lease. They were trustees of the mortgage given by the Wisconsin Central Railroad Company to them to secure its bonds, and entered into possession of its railroad by a title antedating the lease to it by the Milwaukee and Northern Railway Company. They were not, therefore, bound by the terms of that lease, and were under no obligations to undertake its burdens. They were not bound to take possession of the Milwaukee and Northern Railway; they did so merely as a matter of convenience to the parties interested in that road, and for their benefit. On doing so they gave explicit notice of the character of their possession. That notice, dated January 11, 1879, was addressed to Jesse Hoyt, as president of the Milwaukee and Northern Railway Company, and

surviving trustee under its first mortgage and bonds, and trustee under the lease of its railroad to the Wisconsin Central Railroad Company, and assignee of said lease. In it they say:

"We beg to inform you that on the third day of January current we, trustees under and by virtue of the provisions of the first mortgage of the Wisconsin Central Railroad Company, entered upon and took possession of the property covered by that mortgage, and are now operating the Wisconsin Central Railroad.

"We find that the said company was operating the Milwaukee and Northern Railway under a lease. We are not sufficiently informed upon the subject to warrant us in assuming any obligation under that lease. We therefore notify you that we decline to assume, affirm, or in any way ratify that lease. We wish, however, not to interfere in any way with the welfare of that railway, and, unless you otherwise elect, will continue for the present to operate the same temporarily for such compensation as that service may be fairly worth, and, as far as is necessary, but not in excess of its earnings, to repair the same as the Wisconsin Central Railroad Company was doing, and also to permit the business of the Wisconsin Central Railroad Company to be done as heretofore over that railway. We suggest that you arrange for an early personal interview with us, at which you will make known to us your wishes, and confer with a view to a more permanent arrangement.

"We are ready to submit to the parties in interest any proposition which yourself and we are jointly able to recommend."

To this notice no answer appears to have been made, and Hoyt's silence under the circumstances may fairly be taken to be an acquiescence in the arrangement proposed by Stewart and Abbot. The proceedings on the part of Hoyt, as trustee under his mortgage, to foreclose that mortgage, were then pending, and the Wisconsin Central Railroad Company was a party to that suit. If Hoyt was not willing to accede to the terms proposed by Stewart and Abbot in that notice, in respect to the nature of their occupation and operation of the Mil-

waukee and Northern Railway, it was open to him to apply for the appointment of a receiver, as he subsequently did on May 5, 1879, or otherwise to take possession of the Milwaukee and Northern Railway as trustee under the mortgage. The legitimate inference from his conduct is that which was drawn by the court below, which held, as matter of law deduced from the facts found, that the garnishees were not in possession of the Milwaukee and Northern railway under the terms of the lease to the Wisconsin Central Railroad Company, and for the value of its use and occupation were not bound to account to Hoyt. There was neither privity of contract nor privity of estate between Hoyt and them. Their obligation to pay for that use and occupation was to the company that owned the road.

It is argued by the attorney for the plaintiff in error that there is another alternative by which it may be shown that the garnishees do not owe this fund to the Milwaukee and Northern Railway Company; that is, that Stewart and Abbot entered into possession of the Milwaukee and Northern railway as sub-tenants thereof under the Wisconsin Central Railroad Company, the lessee, and are bound to pay rent as such to the latter company. But, as we have already seen, Stewart and Abbot entered into possession of the property of the Wisconsin Central Railroad Company itself adversely to it, as trustees under its mortgage, by a title antecedent to the date of the lease. Stewart and Abbot in no sense could be considered as accountable to the Wisconsin Central Railroad Company as tenants.

We find no error in the judgment of the Circuit Court, and it is, therefore,

Affirmed.

OUACHITA PACKET COMPANY *v.* AIKEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Argued January 5, 1887. — Decided April 25, 1887.

Wharfage is, in the absence of Federal legislation, governed by local state laws, and if the rates authorized by them and by municipal ordinances enacted under their authority are unreasonable, the remedy must be sought by invoking the laws of the state.

A municipal ordinance of New Orleans which authorizes the collection of a wharfage rate, to be measured by the tonnage of the vessels which use the wharves, and estimated to be sufficient to light the wharves, and to keep them in repair, and to construct new wharves as required, and which may realize a profit over these expenses, is *held* not to conflict with the Constitution or with any law of the United States.

In equity. Decree dismissing the bill. Complainants appealed. The case is stated in the opinion of the court.

Mr. John H. Kennard for appellants. *Mr. William Wirt Howe* was with him on the brief.

Mr. William S. Benedict for appellees. *Mr. George Denegre* and *Mr. Thomas L. Bayne* were with him on the brief.

Mr. Justice Bradley delivered the opinion of the court.

The bill in this case was filed in the Circuit Court of the United States by the appellants, for themselves and all others in like interest who should come in and contribute to the expenses of the suit, against Catherine M. Aiken, administratrix of Joseph A. Aiken, and others, residents of New Orleans, doing business under the firm name of Joseph A. Aiken & Co., and against the city of New Orleans. The complainants are owners of steamboats plying between New Orleans and other ports and places on the Mississippi River and its branches in other states than Louisiana; and the burden of their complaint is, that the rates of wharfage which they are

compelled to pay for their vessels at New Orleans are unreasonable and excessive; are really duties of tonnage, and imposed in violation of the Constitution of the United States. The defendants, Joseph A. Aiken & Co., at the time of filing the bill, were lessees of the public wharves belonging to the city of New Orleans, under a lease from the city made in May, 1881, for the term of five years; and, as such lessees, charged and collected the wharfage complained of. The object of the bill, as shown by its prayer, was to obtain an injunction to prevent the defendants from exacting the excessive charges referred to, the complainants expressing a willingness to pay all reasonable wharfage.

The bill alleges that on the 17th of January, 1875, the council of the City of New Orleans adopted an ordinance, "fixing and regulating charges for wharfage, levee, and other facilities afforded by the city of New Orleans to commerce," by which ordinance, among other matters and things, it was ordained that the wharfage dues on all steamboats shall be fixed as follows: "Not over five days, ten cents per ton, and each day thereafter, five dollars per day; boats arriving and departing more than once a week, five cents per ton each trip; boats lying up for repairs during the summer months to occupy such wharves as may not be required for shipping, for thirty days or under, one dollar per day." The entire ordinance was filed with the bill as an exhibit, showing the rates of wharfage to be charged for vessels of every kind.

The bill then states, that on the 17th of May, 1881, the council of the city adopted an ordinance directing the administrator of commerce to advertise for sealed proposals for the sale of the revenues of the wharves and levees for the term of five years, upon certain conditions specified, amongst which were the following, viz: to keep the wharves and levees in good repair; to construct such new wharves as might be necessary, not exceeding the expenditure, in any one year, of $25,000; to light the wharves with electric lights; and to pay the city annually the sum of $40,000, of which $30,000 should be devoted to the maintenance of a harbor police for the protection of commerce, and the remaining $10,000 should be

devoted exclusively to the payment of salaries of wharfingers, signal officers, and other employes on the levees. The sale was to be adjudicated to the persons who should agree to charge the lowest rates of wharfage. Joseph A. Aiken put in a proposal to take the lease on the conditions specified, at the rates of wharfage named in the ordinance of 1875, with certain reductions which he agreed to make from time to time; and this proposal was accepted by the council.

The power to construct and maintain levees and wharves, and to prescribe and collect rates of levee dues and wharfage, had been conferred upon the city council by its charter, act of March 16, 1870, no. 7, § 12; and, by the act of March 13, 1871, it was authorized to lease the wharves, upon adjudication, for any term not to exceed ten years at a time. Laws of 1871, no. 48, § 7.

The point raised by the complainants is, that the rates of wharfage proposed by the lessees were necessarily enhanced by the condition requiring them to erect new wharves, to maintain electric lights, and to pay the city $40,000 per annum for the maintenance of a harbor police, and the payment of salaries to wharfingers, &c. They argue, therefore, that the rates agreed to be charged were intended, not merely as compensation for the use of wharves already constructed, but as a tax to raise money for the use of the city, to enable it to do those things the expense of which should be defrayed from its general resources; it being contended that wharfage cannot be charged for the purpose of raising money to build wharves, but only for the use of them when built. The complainants contend that the charges are unreasonable and excessive as wharfage, and, therefore, unauthorized as such, and, in effect, a direct duty, or burden, upon commerce. They offered a good deal of evidence to show that the rates of wharfage charged are onerous and excessive, and that, without the conditions referred to, the lessees could have offered to take much lower rates; or, at all events, that much lower rates would have been a reasonable and sufficient compensation. On the other hand, the defendants offered evidence to show that the rates were reasonable, and that, with the same or even higher

rates, the city itself, before leasing out its wharves, lost every year a large amount of money in their administration. The court below declared "that the exactions of wharfage are substantially expended for the benefit of those using the wharves, and that the proof does not satisfy us that the rates are exorbitant or excessive." *Ouachita Packet Co.* v. *Aiken*, 4 Woods, 208, 213. We do not think it necessary to scrutinize the evidence very closely. With the Circuit Court, we see nothing in the purposes for which the lessees were required to expend or pay money, at all foreign to the general object of keeping up and maintaining proper wharves, and providing for the security and convenience of those using them. The case is clearly within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by Congress, to establish, manage and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce. We may particularly refer to the recent cases of *Transportation Co.* v. *Parkersburg*, 107 U. S. 691; *Morgan Steamship Co.* v. *Louisiana*, 118 U. S. 455; and *Huse* v. *Glover*, 119 U. S. 543; in which most of the former decisions involving the same principle are cited and referred to. The first of these was a case of wharfage; the second, one of quarantine; and the third, that of a lock in Illinois River constructed by the State of Illinois in aid of navigation. The same principle was applied and enforced in the cases of *Cooley* v. *Board of Wardens of Philadelphia*, 12 How. 299, on the subject of pilotage; in *Mobile* v. *Kimball*, 102 U. S. 691, where a state law provided for the improvement of the river and harbor of Mobile; in the various cases of bridges over navigable rivers which have come before this court, and which are reviewed and approved in *Escanaba Co.* v. *Chicago*, 107 U. S. 678; and in *Turner* v. *Maryland*, 107 U. S. 38, which related to the inspection of tobacco. The same principle was reaffirmed, with the limitations to which its application is subject, in the recent case of *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493. In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United

States cannot, as such, interfere with the regulations made by the State, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. If, in any case of this character, the courts of the United States can interfere in advance of Congressional legislation, it is, (as was said in *Morgan* v. *Louisiana*, *qua supra*,) where there is a manifest purpose, "by roundabout means, to invade the domain of Federal authority."

Wharfage, the matter now under consideration, is governed by the local state laws; no act of Congress has been passed to regulate it. By the state laws, it is generally required to be reasonable; and by those laws its reasonableness must be judged. If it does not violate them, as before said, the United States courts cannot interfere to prevent its exaction. Of course, neither the state, nor any municipal corporation acting under its authority, can lay duties of tonnage; for that is expressly forbidden by the Constitution; but charges for wharfage may be graduated by the tonnage of vessels using a wharf; and that this is not a duty of tonnage, within the meaning of the Constitution, has been distinctly held in several cases; amongst others, in those of *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *St. Louis*, 100 U. S. 423; *Packet Co.* v. *Catlettsburg*, 105 U. S. 559; and *Transportation Co.* v. *Parkersburg*, 107 U. S. 691.

The charges in the present case are professedly for wharfage, and we see nothing in the ordinance fixing the rates inconsistent with the idea that they are such. The city, by its charter, had the power to fix the rates of wharfage, and it established those now complained of. We do not see the slightest pretext for calling them anything else than wharfage. The manner in which the receipts are to be appropriated does not change the character of the charges made. In the case of *Huse* v. *Glover*, 119 U. S. 543, 549, it was said: "By the terms tax, impost, duty, mentioned in the ordinance, [the Ordinance of 1787,] is meant a charge for the use of the government, not

compensation for improvements. The fact that if any surplus remains from the tolls, over what is used to keep the locks in repair, and for their collection, it is to be paid into the state treasury as a part of the revenue of the State, does not change the character of the toll or impost. In prescribing the rates it would be impossible to state in advance what the tolls would amount to in the aggregate. That would depend upon the extent of business done, that is, the number of vessels and the amount of freight which may pass through the locks. Some disposition of the surplus is necessary until its use shall be required, and it may as well be placed in the state treasury, and probably better, than anywhere else." And in the case of *Transportation Co.* v. *Parkersburg*, we said: "It is also obvious that since a wharf is property, and wharfage is a charge or rent for its temporary use, the question whether the owner derives more or less revenue from it, or whether more or less than the cost of building and maintaining it, or what disposition he makes of such revenue, can in no way concern those who make use of the wharf and are required to pay the regular charges therefor; provided, always, that the charges are reasonable and not exorbitant."

In the present case, however, as already indicated, the appropriation actually made of the receipts, namely, to the objects of keeping the wharves in repair, of gradually extending them as additions may be needed, and of maintaining a police for their protection, and lights for their better enjoyment, is entirely germane to the purpose of wharfage facilities. It is what any prudent proprietor would do; it is what the city itself would do if it managed the wharves on its own account. But even if it were otherwise; if a profit should happen to be realized, by the city, or the lessees, beyond the amount of expenditures made, this would not make the charges any the less wharfage. And being wharfage, and nothing else, if the charges are unreasonable, remedy must be sought by invoking the laws of the state, which cannot be done in this suit, inasmuch as the jurisdiction of the court is rested on the supposed unconstitutionality of the charges for wharfage, and not on the citizenship of the parties. If the

state laws furnish no remedy; in other words, if the charges are sanctioned by them, then, as before stated, it is for Congress, and not the United States courts, to regulate the matter, and provide a proper remedy. Such an interposition may become necessary; for although the imposition of unreasonable wharfage by a city or a state is always the dictate of a suicidal policy, the temptation of immediate advantage under stringent pressure will often lead to its adoption.

What measures Congress might adopt for the purpose of preventing abuses in this and like matters, it is not for us to determine. It is possible that a law declaring that wharfage shall be reasonable, and not oppressive, would answer the purpose. It would, then, be in the power of the Federal courts to inquire and determine as to the reasonableness of the charges actually imposed. That no such inquiry, except in the administration of the state law, can be instituted, as the law now stands, is shown in some of the cases to which we have referred. In *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 700, we said: "It is an undoubted rule of universal application, that wharfage for the use of all public wharves must be reasonable. But then the question arises, by what law is this rule established, and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or are not, extortionate? There can be but one answer to these questions. Clearly it must be by the local municipal law, at least until some superior or paramount law has been prescribed. . . . The courts of the United States do not enforce the common law in municipal matters in the States because it is Federal law, but because it is the law of the State."

As the only question determinable in this suit is whether the charges of wharfage complained of were, or were not, contrary to the Constitution or any law of the United States, and as it is clear that they were not, the decree of the Circuit Court must be

Affirmed.

ALBANY AND RENSSELAER COMPANY *v.* LUNDBERG.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued April 1, 1887. — Decided April 25, 1887.

A written contract, made in this country, by which "I, Gustaf Lundberg, agent for N. M. Höglund's Sons & Co. of Stockholm, agree to sell, and we, Albany and Rensselaer Iron and Steel Co., Troy, N. Y., agree to buy" certain Swedish pig iron, which contains no other mention of the Swedish firm, and is signed by Lundberg with his own name merely, as well as by the purchaser, will sustain an action by Lundberg in a court of the United States within the state of New York, by virtue of § 449 of the New York Code of Civil Procedure and § 914 of the Revised Statutes of the United States, if not at common law.

Upon the question whether a warranty, in a written contract of sale of Swedish pig iron, of a particular brand, that the iron shall contain no more than a specified proportion of phosphorus, has been complied with, evidence of the proportion of phosphorus in pig iron made in previous years at the same furnace out of ore from the same mine is irrelevant and incompetent.

THIS was an action at law on a contract. Verdict for the plaintiff, and judgment on the verdict. The defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Edwin Countryman for plaintiff in error.

Mr. Everett P. Wheeler for defendant in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This action was brought by Gustaf Lundberg, an alien and a subject of the Kingdom of Sweden and Norway, residing at Boston in the State of Massachusetts, against the Albany and Rensselaer Iron and Steel Company, a corporation of the State of New York, upon two contracts for the sale and purchase of Swedish pig iron, the first of which was as follows:

"N. M. Höglund's Sons & Co., Stockholm;
"Gustaf Lundberg, Successor to Nils Mitander:
"38 Kilby Street, Boston, February 10, 1880.

"I, Gustaf Lundberg, agent for N. M. Höglund's Sons & Co. of Stockholm, agree to sell, and we, Albany and Rensselaer Iron and Steel Co., Troy, N. Y., agree to buy the following Swedish charcoal grey pig iron, viz: 500 tons of brand NBGPH, at a price of forty-eight ($48) dollars, American gold, per ton of 2240 lbs., delivered on wharf at New York, duty paid; said iron to be in accordance with an analysis furnished in Gustaf Lundberg's letter of 6th February. Payment in gold in Boston or New York funds within 30 days from date of ship's entry at custom-house. Shipment from Sweden during the season, say May next, or sooner, if possible. The above quantity hereby contracted for to be subject to such reduction as may be necessitated by natural obstacles and unavoidable accidents. The seller not accountable for accidents or delays at sea. Signed in duplicate.

"Accepted, Gustaf Lundberg.

"Accepted, Albany & Rensselaer Iron & Steel Co."

The other contract differed only in being for the sale and purchase of "300 tons of brands SBVE and NBBBK."

The analysis referred to in both contracts showed, in the first brand .03, and in the two other brands .024, of one per cent of phosphorus.

The above amount of iron was made in Sweden, that of the first brand at the Pershytte furnace of the Ramshyttan Iron Works, out of ore from the Pershytte mines, and that of the two other brands at the Svana Iron Works; was bought and shipped from Stockholm by N. M. Höglund's Sons & Co. in May, 1880; arrived at New York, in June, 1880, and was thence taken to the defendant's works at Troy. An analysis there made by the defendant's chemist showed in the three brands respectively .047, .042 and .049, of one per cent of phosphorus. The defendant therefore refused to take the iron, and returned it to the plaintiff, who afterwards sold it for less than the contract price, brought this action to recover

the difference, and obtained a verdict and judgment for upwards of $15,000. The defendant sued out this writ of error.

The first question presented by the bill of exceptions is, whether this action can be maintained in the name of Lundberg, or should have been brought in the name of his principals, N. M. Höglund's Sons & Co.

The paper upon which each of the contracts in suit is written has at its head, besides the name of that firm, the name of "Gustaf Lundberg, successor to Nils Mitander," followed by the street and number of his office in Boston. The contract itself begins with a promise by him in the first person singular, "I, Gustaf Lundberg, agent for N. M. Höglund's Sons & Co. of Stockholm, agree to sell;" the description added to his name in this clause is the only mention of or reference to that firm in the contract; his promise is not expressed to be made by them as their agent, or in their behalf; and the agreement is signed by him with his own name merely.

There are strong authorities for holding that a contract in such form as this is the personal contract of the agent, upon which he may sue, as well as be sued, in his own name, at common law. *Kennedy* v. *Gouveia*, 3 D. & R. 503; *Parker* v. *Winlow*, 7 E. & B. 942; *Dutton* v. *Marsh*, L. R. 6 Q. B. 361; *Buffum* v. *Chadwick*, 8 Mass. 103; *Packard* v. *Nye*, 2 Met. 47. In *Gadd* v. *Houghton*, 1 Ex. D. 357, the contract which was held not to bind the agent personally was expressed to be made "on account of the principals;" and in *Oelricks* v. *Ford*, 23 How. 49, in which the contract, which was held to bind the principal, more nearly resembled that before us than in any other case in this court, the important element of a signature of the agent's name, without addition, was wanting.

But it is unnecessary to express a definitive opinion upon the question in whose name, independently of any statute regulating the subject, this action should have been brought.

The Code of Civil Procedure of the State of New York contains the following provision:

"Sec. 449. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly

authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

Under this provision, the Court of Appeals of that state has held that an agent of a corporation, to whom, "as executive agent of the company," a promise is made to pay money, is "a person with whom, or in whose name, a contract is made for the benefit of another," and may therefore sue in his own name on the promise. *Considerant* v. *Brisbane*, 22 N. Y. 389. The rule thus established is applicable to actions at law in the courts of the United States held within the State of New York. Rev. Stat. § 914; *Sawin* v. *Kenny*, 93 U. S. 289; *Weed Sewing Machine Co.* v. *Wicks*, 3 Dillon, 261; *United States* v. *Tracy*, 8 Benedict, 1.

The case then stands thus: If the agreement to sell is an agreement made by Lundberg personally, and not in his capacity of agent of the Swedish firm, the price is likewise payable to him personally, and the action on the contract must be brought in his name, even at common law. If, on the other hand, the agreement must be considered as made by Lundberg, not in his individual capacity, but only as agent and in behalf of the Swedish firm, and for their benefit, then the price is payable to him as their agent, and for their benefit, in the same sense in which an express promise to pay money to him as the agent of that firm would be a promise to pay him for their benefit, and therefore, by the law of New York, which governs this case, an action may be brought in his name. In either view, this action is rightly brought.

The clause, in each of the contracts sued on, "said iron to be in accordance with an analysis furnished in Gustaf Lundberg's letter of 6th February," is doubtless a warranty that the iron shall not contain a greater proportion of phosphorus than is specified in that analysis. The question of fact most contested at the trial was whether the iron tendered by the plaintiff to the defendant fulfilled this warranty.

There was evidence tending to show that any excess of

phosphorus in pig iron would affect the quality of wrought iron or steel made from it, rendering it more brittle, and could be detected by bending the rods after they had been made; and the court, at the request of the defendant, and with the consent of the plaintiff, instructed the jury as follows: "If the jury find that either lot of iron differed as much as one one-hundredth of one per cent in excess of the limit of phosphorus stated in the analysis referred to in the contract, that constituted a breach of the warranty and entitled the defendant to refuse to receive the iron."

Each party called as witnesses many experts, who had made analyses of the iron in question since its arrival, some of whom testified that the amount of phosphorus in each brand was no greater than in the analysis referred to, and others testified that it was more than two hundredths of one per cent greater, or nearly twice as much.

The plaintiff also introduced several depositions taken in Sweden, so much of which as is material to be stated was as follows:

O. Anderson, the manager and a part-owner of the Ramshyttan Iron Works for the last seventeen years, testified that his experience was in the practical part only of the iron manufacture; that he knew the quality, and the percentage of phosphorus, of the iron sold to N. M. Höglund's Sons & Co. in 1880, only from an analysis made by Bernhard Fernguist of pig iron from the same furnace in 1878; that no special analysis was made of the iron sold to the Höglunds, and "no new analysis was made, because no change in the ore was observed;" that other iron was made in the same furnace in 1880, "but all of exactly the same quality;" and further testified: "In the process of manufacture no special tests were made on this pig iron, but I know that this iron is used in the manufacture of Siemens & Martin's steel and iron, and there found to be good."

Fernguist, a professor of chemistry at Orebro, who had made analyses of irons and ores for twenty years, testified to the analysis made by him of pig iron from the Pershytte furnace in 1878, which showed it to contain .028 of one per cent of phosphorus.

Harold Dillner, "an officer in the metallurgic department in the Board of Iron Masters," who in 1880 and for some years before had assisted the owners and manager of the Ramshyttan Iron Works "as technical assistant at Pershytte furnace," being asked his means of knowledge in regard to the percentage of phosphorus in the parcels of iron sold to the Höglunds, and whether he knew of these parcels, or any of them, having been put to any practical test, testified: "We have trustworthy analyses of the ores from Pershytte mines and of pig iron from Pershytte furnace, which verify the always excellent quality of the ore and the pig iron manufactured of it." "It is generally known that the iron is of excellent quality, and I made no special tests."

A. E. Cassel, manager of the Svana Iron Works in 1879 and 1880, having testified, as to the iron from those works sold to the Höglunds in 1880, that the inspection of its manufacture at the furnaces was conducted "in the same manner as during the preceding years, with the greatest care and attention," and that his means of knowledge as to the percentage of phosphorus in this iron were derived from previous analysis of iron that they manufactured, further testified: "In the pig iron we made, the percentage of phosphorus is about .022 per cent, and of sulphur, 0.22; and I think that the pig iron in question contained about these quantities." "Complete journal is kept of how much of each kind of ore is used for each day. The quality of the ores has not changed materially during the last five years."

The admission of this testimony in the depositions was duly excepted to, and we are of opinion that it was incompetent. Much of it, and especially Anderson's remark that this iron was found to be good in the manufacture of steel and iron by Siemens & Martin, was mere hearsay. All the statements of the deponents as to the proportion of phosphorus in the iron in question were based on analyses by other persons of pig iron made in previous years, none of which were produced, or their contents proved, with the single exception of Fernguist's analysis of iron from the Pershytte furnace two years before. It is not shown, and cannot be presumed, that

a difference of one or two hundredths of one per cent in the amount of phosphorus in pig iron could be detected by observation of the ore, or by inspection of the manufacture of the pig iron. Under these circumstances, evidence of the amount of phosphorus in iron made in previous years was wholly irrelevant to the question of the amount of phosphorus in iron made in 1880; and the general expressions of opinion as to the excellence of the pig iron and the care taken in its manufacture did not render that evidence competent, but rather tended to divert the attention of the jury from the real issue, which was whether the particular iron tendered by the plaintiff to the defendant conformed to the express warranty in the contract between them.

The case differs from that of *Ames* v. *Quimby*, 106 U. S. 342, where, in an action to recover the price of shovel-handles sold to the defendant, evidence of the good quality of other like handles sold by the plaintiff at the same time was admitted, accompanied by direct evidence that the latter were of the same kind and quality as the former.

This testimony being irrelevant and incompetent, and manifestly tending to prejudice the defendants with the jury, its admission requires the verdict to be set aside; and it becomes unnecessary to consider the rulings upon other evidence and upon the question of damages.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

BOYNTON *v.* BALL.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Argued April 4, 5, 1887. — Decided April 25, 1887.

A discharge in bankruptcy may be set up in a state court to stay the issue of execution on a judgment recovered against the bankrupt after the commencement of the proceedings in bankruptcy and before the discharge; although the defendant did not before the judgment ask for a stay of proceedings under Rev. Stat. § 5106.

Statement of Facts.

In the year 1865 Ball, the defendant in error, and one Griffin, since deceased, recovered a judgment against Boynton, the plaintiff in error, for $6223.99. In April, 1875, Ball commenced an action of debt in a state court of Illinois against Ball, to recover the amount of that judgment and interest.

On the 19th of March, 1878, a rule was made that the defendant should plead, and on the 4th of the following April he pleaded as follows:

"And the defendant, by James I. Neff, his attorney, comes and defends the wrong and injury when, &c., and says that he does not owe the said sum of money above demanded or any part thereof in manner and form as the plaintiff hath above thereof complained against him. And of this the defendant puts himself upon the country, &c."

On this plea issue was joined, and, a jury being waived, the case was submitted to the court. At December Term, 1879, judgment was entered in the plaintiff's favor against the defendant for the sum of $6233.99 debt, and $5234.99 damages. Execution issued therefor, which was returned unsatisfied on the 20th May, 1880.

On the 25th March, 1881, Boynton filed a motion for a perpetual stay of execution on that judgment, supporting it by proof that he was declared a bankrupt on the 15th day of April, 1878, and that he received his certificate of discharge on the 23d December, 1880. Notice of this motion was served on Ball, who appeared and opposed the granting of it, setting up the appearance of Boynton in the suit, his plea, the joinder of issue, the submission to the court, and the entry of judgment — all after the commencement of the proceedings in bankruptcy, though before the date of the discharge. At the hearing in the Circuit Court at March Term, 1881, the motion for the stay of execution was denied. This judgment was affirmed on appeal by the Supreme Court of Illinois in March, 1882. *Boynton* v. *Ball*, 105 Ill. 627. Boynton then sued out this writ of error.

Mr. Leonard Swett, (with whom was *Mr. Edward R. Swett* on the brief,) for the plaintiff in error cited — English cases:

Argument for Plaintiff in Error.

Bouteflour v. *Coates*, Cowp. 25 (1774); *Blandford* v. *Froud*, Cowp. 138 (1774); *Scott* v. *Ambrose*, 3 M. & S. 326 (1814); *Willett* v. *Pringle*, 5 Bos. & Pul. 190 (1806); *Dinsdale* v. *Eames*, 2 Brod. & Bing. 8 (1820); *Davis* v. *Shapley*, 1 B. & Ad. 54 (1830); *Barrow* v. *Poile*, 1 B. & Ad. 629 (1830); *Humphreys* v. *Knight*, 6 Bing. 572 (1830). Cases under the act of 1841: *Graham* v. *Pierson*, 6 Hill, 247 (1843); *McDougald* v. *Reid*, 5 Ala. 810 (1843); *Rogers* v. *Western Marine Ins. Co.*, 1 La. Ann. 161 (1846); *Curtis* v. *Slosson*, 6 Penn. St. 265 (1847); *Mechanics Banking Ass'n* v. *Lawrence*, 1 Sandf. 659 (1847); *Harrington* v. *McNaughton*, 20 Vt. 293 (1848); *Turner* v. *Gatewood*, 8 B. Mon. 613 (1848); *Blake* v. *Bigelow*, 5 Geo. 437 (1848); *Johnson* v. *Fitzhugh*, 3 Barb. Ch. 360, 372 (1848); *Peatross* v. *McLaughlin*, 6 Gratt. 64 (1849); *Cogburn* v. *Spence*, 15 Ala. 549, 554 (1849);[1] *Clark* v. *Rowling*, 3 Comst. 216 (1850);[2] *Fox* v. *Woodruff*, 9 Barb. 498 (1850); *Dick* v. *Powell*, 2 Swan (Tenn.), 632 (1853); *Downer* v. *Rowell*, 26 Vt. 397 (1854); *McDonald* v. *Ingraham*, 30 Mississippi, 389 (1855);[3] *Imlay* v. *Carpentier*, 14 Cal. 173 (1859). Cases under the act of 1867: *Cornell* v. *Dakin*, 38 N. Y. 253 (1868); *In re Stephen Brown*, 3 Bankr. Reg. 585 (1870); *In re Crawford*, 3 Bankr. Reg. 698 (1870); *In re Stevens*, Bankr. Reg. 367 (1871); *Monroe* v. *Upton*, 50 N. Y. 593 (1872); *Shurtleff* v. *Thompson*, 63 Maine, 118 (1873); *Norton* v. *Switzer*, 93 U. S. 355 (1876); *In re Stanfield*, 4 Sawyer, 334 (1877); *Dawson* v. *Hartsfield*, 79 No. Car. 334 (1878); *Dresser* v. *Brooks*, 3 Barb. 429 (1848); *Anderson* v. *Anderson*, 65 Geo. 518 (1880); *Arnold* v. *Oliver*, 64 Howard Pr. 452 (1883); *Windley* v. *Tankard*, 88 N. C. 223 (1883); *Root* v. *Espy*, 93 Ind. 511 (1883); *Easley* v. *Bledsoe*, 59 Texas, 488 (1883); *Braman* v. *Snider*, 21 Fed. Rep. 871 (1884); *Balliett* v. *Dearborn*, 27 Fed. Rep. 507 (1886).

Mr. J. A. Crain for defendant in error.

The very numerous authorities cited by the plaintiff as to whether, after a judgment against a bankrupt pending his bankruptcy proceedings, but before discharge received, the

[1] *S. C.* 50 Am. Dec. 140. [2] *S. C.* 53 Am. Dec. 290. [3] *S. C.* 64 Am. Dec. 166.

court will stay execution, are each and every of them decisions made upon bankrupt acts having nothing like the section of the act of 1867 found in the Rev. Stat. § 5106; that being a *new* section, and they are no authorities as to the duty that section imposes upon the bankrupt.

Section 14 of St. 49 Geo. III, c. 121, quoted by plaintiff in error, prohibits any creditor who shall have brought action or instituted suit against a bankrupt, on any demand arising *prior* to bankruptcy, or which might have been proved, from proving a debt unless on condition of relinquishing such suit or action. St. 6 Geo. IV, c. 16, § 59, also quoted by plaintiff, is to same effect.

Section 5 of the act of Congress of 1841, cited by plaintiff, provides that no creditor coming in and proving his debt shall be allowed to maintain any suit therefor, but shall be deemed to have waived all right of action; and it declares, as the effect of so proving, all actions commenced and unsatisfied judgments already obtained surrendered. Section 5105 of the Revised Statutes is to precisely the same effect. But inasmuch as Ball, the here defendant, has never proved his debt against Boynton, the plaintiff in error, nor has Ball in any way or manner connected himself with Boynton's bankruptcy proceedings, it is submitted that all the above mentioned sections have no bearing whatever on any question in this case.

St. 34 & 35 H. VIII, c. 4, enacted in 1542, was the first bankrupt act. Its preamble is as follows: "Whereas, divers and sundry Persons craftily obtaining into their hands great substances of other Men's Goods, do suddenly flee to parts unknown, or keep their Houses, not minding to pay or restore to any of their Creditors their Debts and Duties, but at their own Wills and Pleasures, consume the Substance obtained by Credit of other Men for their Pleasure and delicate Living, against all Reason, Equity, and good Conscience; therefore, be it enacted, etc."

Every succeeding act up to St. 4 & 5 Anne, c. 17, contained like severe denunciations against this class of delinquents. By this last mentioned act it is provided that if the bankrupt has fully turned over all his estate to his creditors, and made full

disclosure, he shall have a certain allowance or exemption, and shall also, having fully conformed to the act, be allowed a certificate. This is the first statute giving either, and was continued into the more permanent act of St. 5 Geo. II, c. 30, where, by the 7th section, a discharge is given from all debts by him owing at the time he became bankrupt; and in case he should, after having received his certificate, be arrested, prosecuted, or imprisoned for any debt due before the time he became bankrupt, he was to be discharged on common bail, and might plead that the cause of action accrued before his bankruptcy.

No such provision, or anything having even a resemblance to § 5106, is to be found in either the Bankrupt Act of 1800, 2 Stat. 19, or that of 1841, 5 Stat. 440; consequently, any decision predicated on those acts has no weight, and is of little authority in determining the effect of, and duties imposed on the bankrupt by, this new section in the act of 1867.

This was a new feature of the bankrupt law; neither it, nor anything like it, had ever existed, either in England or this country, and experience indicated, and justice demanded, that there should be some mode provided by which, when a suit was pending against a defendant (as was *Ball* v. *Boynton*), and he went into bankruptcy, that when adjudicated a bankrupt he could stay such suit until the question of whether he was to get a discharge should have been first determined.

The act created this privilege and defence, which, if defendant had then interposed in this case, the judgment in question never could, on his own theory of the effect of his discharge, have been recovered against him. His duty, after going into bankruptcy, is clearly pointed out in *Holden* v. *Sherwood*, 84 Ill. 94, where the defendant, after verdict, suggested his bankruptcy, and filed his discharge, but did nothing more. Uniformly, since our very first act on the subject, the bankrupt having a certificate of discharge, has been required to plead it. *Fellows* v. *Hall*, 3 McLean, 281; *Steward* v. *Green*, 11 Paige, 551; *Manwarring* v. *Kouns*, 35 Texas, 171; *Park* v. *Casey*, 35 Texas, 536; *Seymour* v. *Browning*, 17 Ohio, 362; *Horner* v. *Spellman*, 78 Ill. 206.

Argument for Defendant in Error.

We submit that the precedents established under a statute unlike any act of Congress ever existing here, established no principle that can be deduced from any bankrupt act ever in force in this country. And we maintain that § 5106 Rev. Stat. afforded defendant an ample opportunity and remedy, of which he neglected to avail himself for over nineteen months *before* our judgment. He then came into court, and without any intimation that he had gone into bankruptcy, or should rely on his bankruptcy, actually *joined us in submitting his case for trial*, by which we obtained our judgment incurring the costs thereof, and of the execution issued thereon, and he is, therefore, now estopped from interposing his discharge.

The rendition of the new judgment upon the old decree made such a new and essentially different debt that it thereby became not provable against his estate, and is not affected by his discharge. See *In re Gallison*, 2 Lowell 72, and the reasoning of the court, and the authorities on both sides cited in the opinion of the court. *In re Williams*, 3 Bankr. Reg. 79; *Dimock* v. *Revere Copper Co.*, 117 U. S. 559; *Holbrook* v. *Foss*, 27 Maine, 441; *Pike* v. *McDonald*, 32 Maine, 418;[1] *Fisher* v. *Foss*, 30 Maine, 459; *Sampson* v. *Clark*, 2 Cush. 173; *Woodbury* v. *Perkins*, 5 Cush. 86;[2] *Faxon* v. *Baxter*, 11 Cush. 35; *Carrington* v. *Holabird*, 17 Conn. 530; *Kellogg* v. *Schuyler*, 2 Denio, 73; *Gould* v. *Hayden*, 63 Ind. 443; *Steadman* v. *Lee*, 61 Geo. 59; *Rutherford* v. *Roundtree*, 68 Geo. 725; *Evarts* v. *Hyde*, 51 Vt. 183; *Hersey* v. *Jones*, 128 Mass. 473; *Miller* v. *Clements*, 54 Texas, 351; *Bradford* v. *Rice*, 102 Mass. 472; *McCarthy* v. *Goodwin*, 8 Missouri App. 380; *Wise's Appeal*, 99 Penn. St. 193; *Bown* v. *Morange*, 108 Penn. St. 69; *Brackett* v. *Dayton*, 34 Minn. 219; *Boynton* v. *Ball*, 105 Ill. 627; *Bowen* v. *Eichel*, 91. Ind. 22.

Mr. Justice Miller delivered the opinion of the court.

This is a writ of error to the Supreme Court of the state of Illinois. The question of Federal law, which gives jurisdiction

[1] *S. C.* 54 Am. Dec. 597. [2] *S. C.* 51 Am. Dec. 51.

to this court to review the judgment of the state court, arises out of the refusal of that court to give effect to a certificate of discharge in bankruptcy to Boynton, the plaintiff in error.

Ball, the defendant in error, brought suit against Boynton in the Circuit Court of the state of Illinois for Stephenson County, on April 16, 1877. To this Boynton filed his answer April 4, 1878, and judgment was rendered against him on December 9, 1879, for $6223.99 debt, and $5234.99 damages and costs. Pending this suit in the state court Boynton, on his own application, was declared a bankrupt April 15, 1878, and received his discharge from all his debts December 23, 1880. An execution on the judgment against Boynton in the state court was issued February 21, 1880, and returned unsatisfied. On March 25, 1881, Boynton filed a petition in the state court, asking for a perpetual stay of execution on the judgment rendered in favor of Ball, and filed a certified copy of his discharge in bankruptcy, together with certain affidavits. Ball was served with notice of this motion and appeared and made defence. The motion was overruled by the circuit court, from which ruling Boynton appealed to the Supreme Court of the state, which court affirmed the judgment of the court below with costs. 105 Ill. 627.

The question presented for us to consider is, whether the discharge in bankruptcy was, under the circumstances of this case, a discharge from the judgment rendered in the circuit court of Stephenson County while the proceedings in bankruptcy were pending. It will be perceived that the suit in the state court was commenced before the proceedings in bankruptcy in which the discharge was finally granted. It will also be perceived that the case lingered in the state court from April 16, 1877, until December 9, 1879, when the final judgment was rendered, a period of over two years, but that the plaintiff in error did not obtain his final discharge in bankruptcy until December 23, 1880, which was more than a year after the judgment was obtained against him in the state court.

In *Dimock* v. *The Revere Copper Co.*, 117 U. S. 559, decided at the last term of this court, a case very similar to this was

presented to us for our consideration. Dimock, being sued in the state court of Massachusetts, made defence, and pending the action was discharged from all his debts under bankruptcy proceedings, receiving his certificate of discharge as a bankrupt a few days before final judgment against him in the state court. Notwithstanding he had this discharge at the time the judgment was rendered against him in the state court, he did not plead it in bar of that action nor bring it in any manner to the attention of the court. He was afterwards sued upon this judgment in the Supreme Court of the state of New York, and there pleaded his discharge in bankruptcy in bar of the action. That court, however, held the certificate of discharge not to be a bar, and rendered judgment against him. This judgment was reversed in the Supreme Court, in General Term, and that judgment was in turn reversed by the Court of Appeals, which restored the judgment of the court in Special Term. This court, in reviewing that judgment, said that the Superior Court of Massachusetts, in which the first suit was brought, had jurisdiction of the case, which was rendered complete by the service of process and the appearance of the defendant; that nothing that was done in the bankruptcy court had ousted the jurisdiction of that court, which, accordingly, proceeded in due order to judgment; that this judgment having been rendered after the certificate of discharge in bankruptcy which had not been called to the attention of the court in any manner, nor any stay of proceedings in the state court asked on account of the pendency of the bankruptcy proceedings, the question before the Massachusetts court for decision at the time it rendered judgment was, whether Dimock was then indebted to the Revere Copper Company, and we held that it had jurisdiction and rightfully rendered judgment on this question in favor of that company, notwithstanding the proceedings in the bankruptcy court of which it could not take judicial notice. This decision was supported by references to cases heretofore decided involving similar questions in this court and in the courts of the states.

The principle on which the case was decided was that, while the discharge in bankruptcy would have been a valid defence

to the suit if pleaded at or before the time judgment was rendered in the Massachusetts court, it had in that respect no more sanctity or effect in relieving Dimock of his debt to the company than a payment, or a receipt, or a release, of which he was bound to avail himself by plea or suggestion of some kind as a defence to the action in proper time; that, showing no good reason why he should not have presented that discharge, and permitting the judgment to go against him in the Massachusetts court, without an attempt to avail himself of it there, the judgment of that court was conclusive on the question of his indebtedness at that time to the copper company. That case, so parallel in its circumstances to the one now before us, would be conclusive of the latter if Boynton had had his certificate of discharge, or if the order for it had been made by the bankruptcy court before the judgment in the state court. But, as we have already seen, the judgment in the state court was rendered more than a year before the order of discharge in the bankruptcy court, and Boynton therefore had no opportunity to plead a discharge which had not then been granted, as a defence to that action.

Two propositions are advanced by counsel for defendant in error, in support of the judgment of the Supreme Court of Illinois, as reasons why the certificate obtained so long after the judgment in the state court should not have the effect of a discharge of the debt evidenced by that judgment. The first of these is, that the original debt on which the action was brought in the Circuit Court of Stephenson County no longer exists, but that it was merged in the judgment of that court against Boynton, and was therefore not released under the act of Congress, which declares that all debts provable against the estate of the bankrupt at the time bankruptcy proceedings were initiated shall be satisfied by the order of the court discharging the bankrupt. The argument is, that the judgment now existing against Boynton is not the debt that existed at the time bankruptcy proceedings were initiated; that by the change of the character of the debt from an ordinary claim or obligation to a judgment of a court of

record it ceased to be the same debt and became a new and different debt as of the date of the judgment. Some authorities are cited for this general proposition of a change of the character of the debt by merger into the judgment, and some authorities are also cited by counsel for plaintiff in error to the contrary. See Judge Blatchford, *In re Brown*, 5 Benedict, 1; *In re Rosey*, 6 Benedict, 507.

But this court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court and the existence of which was provable in bankruptcy.

The next proposition is, that under § 5106 of the Revised Statutes of the United States it was the duty of Boynton to make application to the state court, before judgment in that court, to have the proceedings there stayed, to await the determination of the court in bankruptcy on the question of his discharge. That section is in the following language:

"No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

This cannot be construed to mean anything more than that where the bankruptcy proceedings are brought to the attention of the court in which a suit is being prosecuted against a

bankrupt, that court shall not proceed to final judgment until the question of his discharge shall have been determined. The state court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge. Even the direction that it shall be stayed is coupled with a condition that "there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge;" and with the further provision that "if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due."

These provisions exclude altogether the idea that the state court has lost jurisdiction of the case, even when the bankrupt shall have made application showing the proceedings against him. The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the second place, he may have a defence in the state court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid pro rata with his other debts by the assignee in bankruptcy.

If for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy

does not intervene as he may do, *Hill* v. *Harding*, 107 U. S. 631, he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution which he asks for now. See *McDougald* v. *Reid*, 5 Ala. 810.

In *Rogers* v. *The Western Marine and Fire Ins. Co.*, 1 La. Ann. 161, the court in a similar case, says: "The proposition that Rogers should have pleaded the pendency of the bankrupt proceedings in the original suit, and cannot disturb the execution of the judgment which is final, is untenable. The discharge in bankruptcy was posterior to the rendition of this judgment, and operated with the same force upon the debt after it assumed the form of a judgment as it would have done had the debt remained in its original form of a promissory note."

These and many other decisions under the bankrupt law of 1841 are to be found in the brief of the plaintiff in error. The same principle is decided in *Cornell* v. *Dakin*, 38 N. Y. 253, and in several cases in the District and Circuit Courts of the United States. There is a very able review of the subject by Judge Hillyer of the United States District Court of Nevada, in the case of *Stansfield*, reported in 4 Sawyer, 334.

The same thing was held by the Court of Appeals of New York, in *Palmer* v. *Hussey*, 87 N. Y. 303, 310, which was affirmed in this court on writ of error in *Palmer* v. *Hussey*, 119 U. S. 96.

It follows from these considerations that

The Supreme Court of Illinois was in error in failing to give due effect to Boynton's discharge in bankruptcy, and its judgment is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion.

THE JOHN H. PEARSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Argued April 11, 12, 1887. — Decided April 25, 1887.

A vessel was chartered to carry a cargo of oranges from Palermo to Boston. The words "captain engages himself to take the northern passage" were written into the printed blank. The cargo was badly damaged, and the charterers libelled the vessel to recover for the loss. The court below found that "northern passage" appeared from the proof to be a term of art, unintelligible without the aid of testimony, that the evidence concerning it was conflicting, and that it was immaterial to decide it, as the claimant was entitled to the least strict definition, and the actual course of the vessel came within that definition. *Held*, that this was error; that if the term was a term of art, it should have been found by the court; and that if there was no passage known as "northern," the vessel was bound to take the one which would carry it in a northerly direction through the coolest waters into the coolest temperature, and the court should have ascertained from the proof what passages between Gibraltar and Boston vessels were accustomed to take, and should have determined which of them the contract permitted the vessel to choose.

This was an appeal in admiralty, and presented the following facts:

The barque John H. Pearson was chartered to carry a cargo, consisting mostly of oranges, for the libellants, from Palermo, Sicily, to Boston, Massachusetts. The charter party contained the words "captain engages himself to take the northern passage," inserted at the instance of the libellants, for the benefit of the cargo, and written into the printed blank. The cargo was badly damaged on the voyage, and this suit was brought to recover for the loss. The controversy is as to whether the vessel, in going from Gibraltar to Boston, took the "northern passage."

The court found that "shippers of fruit consider it of very great importance for the preservation of the cargo that it be kept in as cold a temperature as possible, short of the freezing

point, and have been accustomed for many years to instruct masters to take a northerly course;" and, after setting forth other facts, stated as "conclusions of law" the following:

"1. The term 'northern passage' appears, in view of the testimony of merchants and seamen introduced on both sides, to be a term of art, and is, when taken by itself, without the aid of such testimony, unintelligible.

"The testimony introduced by the libellants tended to show that the phrase meant a passage from Gibraltar to the Great Banks, and thence direct to Boston, keeping as much to the north as possible during the entire passage; that anything between that and the southern passage was the middle passage.

"That introduced by the claimant tended to show that it meant anything north of latitudes 30° to 35° or 36°, or of the southern passage; and that the middle passage was anything between the southern passage and the northern, as described by the respective witnesses.

"It was admitted that the southern passage was in the trade winds.

"2. Upon this testimony, the court, thinking that the true meaning of the term is very doubtful, does not consider it material, and does not undertake to decide whether a preponderance of the evidence favors one of the above definitions or another, and rules that the claimant is entitled to the least strict definition, and that, as the course of the barque comes within such definition, there is no deviation."

The libel was dismissed, and from a decree to that effect this appeal was taken. The opinion of the Circuit Court is reported in 14 Fed. Rep. 749.

Mr. Henry W. Putnam for appellants.

Mr. Frederic Dodge for appellees.

The facts found do not of themselves establish any construction of the phrase "northern passage," still less the construction claimed by appellant. There is nothing in the facts found which casts upon the appellee any burden of proof, or warrants any presumption which must be rebutted by him.

Upon a resort to evidence for the meaning of the phrase in question, the stricter construction contended for by the appellant is not established by a mere preponderance of evidence in favor of his construction; — still less in the case of an equal balance of opposing evidence as to the meaning. The appellants have to show, in order to establish their interpretation, not merely that there *is a usage* such as they claim as to the meaning, but that there is a usage *so general, so well known* and so *universally accepted*, that the parties to this contract *must be presumed* to have used the words in the sense so established. *The Paragon*, 1 Ware, 322; *Rogers* v. *Mechanics' Ins. Co.*, 1 Story, 603; *Robinson* v. *The United States*, 13 Wall. 363; see also *Barnard* v. *Kellogg*, 10 Wall. 383; *Kirchner* v. *Venus*, 12 Moore, P. C. 361; *Winsor* v. *Dillaway*, 4 Met. (Mass.) 221; *Porter* v. *Hills*, 114 Mass. 106; *Mooney* v. *Howard Ins. Co.*, 138 Mass. 375; *Harris* v. *Tunbridge*, 83 N. Y. 92, 100; *Lyon* v. *Culbertson*, 83 Ill. 33, 37.

Such a usage as is thus shown to be necessary for the appellants' purposes, is not necessarily established by the fact that a preponderance of the evidence favors the meaning they contend for. *Parrott* v. *Thacher*, 9 Pick. 426; *Porter* v. *Hills*, above cited; *Winsor* v. *Dillaway*, 4 Met. (Mass.) 221; *Brown* v. *Brown*, 8 Met. 573, 276; *Daniels* v. *Insurance Co.*, 12 Cush. 416, 429;[1] *Law* v. *Cross*, 1 Black, 533.

The conclusion of the circuit judge, therefore, that "the true meaning of the term is very doubtful" really amounts to a finding of *fact*, that no such usage existed as was necessary to establish the meaning or definition asserted by the appellants.

If the maxim that the words are to be construed "*fortius contra proferentem*" has any application to the case, it is important first to determine who is "*proferens*."

It is said in a recent text-book, "It is often difficult to decide who are the *proferentes* with regard to special words of a contract, but this is to be determined in each case upon an examination of the substance and character of words, made in the light of the whole contract and the circumstances sur-

[1] *S. C.* 59 Am. Dec. 192.

rounding it." Jones on Construction of Commercial and Trade Contracts, New York, 1886, § 230. An examination of the cases shows, however, that whenever the words appear to have been selected by one of the parties for his own benefit, and by him proposed for the other's acceptance, — although they may be in form a promise by the other, — yet he who selects them is *proferens*, within the meaning of the maxim, and the construction is to be most strict against him, and most favorable against the other. This principle has been often applied to policies of insurance: *National Bank* v. *Ins. Co.*, 95 U. S. 673, 679; *Grace* v. *Am. Central Ins. Co.*, 109 U. S. 278, 282; *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 341. And in like manner to Charter Parties; *Hudson* v. *Ede*, L. R. 2 Q. B. 566, 578; *Burton* v. *English*, 12 Q. B. D. 218, 220, 222; *Airey* v. *Merrill*, 2 Curtis, 8, 11; *Issakson* v. *Williams*, 26 Fed. Rep. 642, 644. See also Sandar's Justinian, 6th ed., 332; Bouvier, Law Dictionary, *Stipulatio;* Maine, Ancient Law, London, 1870, 328, 329; Code Civil (France), Liv. III. tit. iii. § v. de l'Interprétation des Conventions, art. 1162; Revue International de Droit Maritime, 1885–6, 44.

Mr. Chief Justice Waite, after stating the case, delivered the opinion of the court.

As the libellants deemed the agreement to "take the northern passage" of sufficient importance to have a printed form changed, so that it might be incorporated in express words into the charter party, and this "for the benefit of the cargo," which was perishable, it is evident that the words used had some meaning which indicated clearly to the minds of the contracting parties the direction the vessel was to take on her way from Gibraltar to Boston. It is also evident, from the fact that the vessel was bound to take *the* northern passage, that the parties understood there was more than one passage which vessels were in the habit of taking in making that voyage, according as their bills of lading or their charter parties required, or the circumstances made desirable. It implies that there were one or more other passages which those engaged in the trade knew by other names or other

descriptions. What "the northern passage" as used in this contract means, therefore, is either a question of fact or a question of construction applicable to understood facts.

If it is, as the court below says it appears to be, a term of art, which, taken by itself, without the aid of the testimony, is unintelligible, then its meaning in "the art" — the trade — is one of the material facts in the case on which the rights of the parties depend, and it should have been found and put into the findings of fact which the Circuit Court was required by law to make. The statement of the court, now in the record, implies that there is in fact some particular passage between Gibraltar and Boston, which those engaged in that trade know as "the northern passage." If there is, then that is the passage the vessel was bound to take, and it was error in the court to decide that its determination, according to the preponderance of the evidence, was immaterial, for the choice of passages was matter of obligation, not of convenience merely.

If in point of fact there is no passage to which the name or description of "the northern" has been given in the trade, then the question becomes one of construction as applied to the known facts of the business. The inquiry is, not as to which passage would be the quickest, or even the best, or which another contract would require of another vessel, but which is "the northern passage" within the meaning of this contract. The evident purpose of the libellants was, to keep the vessel as far as possible in the coolest of the passages that those engaged in the trade were accustomed to take, because it is found as a fact in the case that a cool temperature is necessary to the preservation of the cargo, and that the coolest water is north of the Gulf Stream, owing to the fact that there is a cold current between it and the American coast moving in an opposite direction.

Under these circumstances, if the testimony failed to show that any particular passage had acquired in the trade the name of "the northern," it was error to rule that the vessel might voluntarily take any other of the known or accustomed passages than one which would carry it in a northerly di-

rection through the coolest waters and into the coolest temperature. That this was the expectation of the parties is shown by the fact that the stipulation as to the passage was made "for the benefit of the cargo," the preservation of which required that it should be kept "in as cold a temperature as possible, short of the freezing point." The court should have ascertained from the evidence what passages there were between Gibraltar and Boston which vessels were accustomed to take, and then determined which of them this vessel was allowed by its contract to choose as "the northern."

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

CARPENTER *v.* WASHINGTON AND GEORGETOWN RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Submitted April 22, 1887. — Decided May 2, 1887.

The charge of the court in this case was eminently favorable to the plaintiff below, who is plaintiff in error, and, when it is taken in connection with the testimony, it is clear that the jury found a verdict for defendant on the ground that the plaintiff was in fault, and that the defendant's agents used no unnecessary force.

This was an action at law against the defendant in error for the ejection of the plaintiff in error from its cars by its servants. Judgment for defendant. Plaintiff sued out this writ of error. The case is stated in the opinion of the court.

Mr. C. C. Cole and *Mr. W. L. Cole* for plaintiff in error.

Mr. Enoch Totten and *Mr. Walter D. Davidge* for defendant in error.

Opinion of the Court.

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia.

The defendant in error, the Washington and Georgetown Railroad Company, is a street railroad company doing business in the city of Washington, its road having two branches, crossing each other at right angles at the intersection of Pennsylvania Avenue and Seventh Street. Passengers who had paid their fare on either branch of the road, upon arriving at this crossing, were entitled to receive a transfer ticket, which permitted them, without further payment, to take the other branch in the continuation of their journey.

The plaintiff in error, James N. Carpenter, who was also the plaintiff below, who testified to taking his passage on the Seventh Street branch of this road, got off at this crossing, received a ticket from the agent, who was stationed at that point for the purpose of delivering transfer tickets to passengers who wished to change cars, and took his seat in a car on the Pennsylvania Avenue branch going east toward the Capitol. When the conductor of the car came around to collect tickets, it was found that Carpenter had a transfer ticket which was intended for use on the Seventh Street branch and not on Pennsylvania Avenue. The conductor refused to accept this ticket, and demanded of Carpenter the usual fare charged for riding on that road. After some altercation, Carpenter peremptorily refusing to pay the fare demanded or get off when requested so to do, the car was stopped and the conductor and driver put him off forcibly. He then brought suit against the company. Upon a trial before a jury, a verdict was rendered for the defendant, and the judgment on this verdict, on appeal to the Supreme Court of the District in bank, was affirmed.

The entire testimony is embodied in a bill of exceptions, and no question arises on the admission or rejection of evidence, nor is there much contradiction in it, except that there may be some little difference between the statement of the plaintiff as to the degree of force used to put him off the car

and that of the conductor and driver on the same subject. There were, however, some exceptions taken to the charge of the court, as well as to the refusal to give instructions prayed for by plaintiff. We think, however, that the charge given by the court *sua sponte*, when taken in connection with the verdict of the jury, contains all that need be considered. That charge is embodied in the fifth bill of exceptions, and is as follows:

"And thereupon the court instructed the jury that if they believed from the evidence that the agents of the defendant had made a mistake in giving to the plaintiff a transfer ticket, and instead of giving him a Pennsylvania Avenue transfer had given him a Seventh Street transfer, that the plaintiff was entitled to recover, and that in assessing the damages the plaintiff was entitled to have reasonable damages compensatory for the treatment which he had received, and that the defendant company was bound to see to it that the plaintiff was provided with a proper transfer, and that if the mistake had been made the responsibility therefor rested upon the company and not upon the plaintiff.

"And the court further instructed the jury that if, upon the other hand, they believed that the conduct of the agents of the company was wanton and malicious, and that they had purposely given him the wrong transfer, and that they had maliciously and wantonly ejected him from the car because of personal dislike or animosity, then the plaintiff was entitled to recover, and in assessing damages, in that view of the case, the plaintiff was entitled to recover not only compensatory but vindictive damages, and to this latter branch of the instruction the defendant, by its counsel, then and there objected, and the objection was overruled and an exception was duly noted.

"The court thereupon further instructed the jury that if the jury were satisfied from the evidence that the plaintiff did not get off from the Seventh Street car, as related by him, but that he came from the west-bound Avenue car, with the passengers from that car, and presented himself, with those passengers, to the transfer agent of the defendant, and that the plaintiff received the Seventh Street transfer without objection

or remark, and undertook to ride upon it on a Pennsylvania avenue car, the defendant was entitled to a verdict."

This whole charge, it seems to us, was eminently favorable to the plaintiff. The first point made in it was that if the jury believed from the evidence that the agent of the defendant had made a mistake in giving to the plaintiff a Seventh Street instead of a Pennsylvania Avenue transfer ticket, that then the plaintiff was entitled to recover. It is obvious from the verdict of the jury, which was against the plaintiff, that they did not believe that the agents of the defendant company at the crossing were responsible for the mistake that had been made there, because in the same connection the court instructed the jury that if they were satisfied from the evidence that the plaintiff did not get off from the Seventh Street car, as related by him, but that he came from the west-bound Avenue car, with the passengers from that car, and presented himself, with those passengers, to the transfer agent of the defendant, and that the plaintiff received the Seventh Street transfer without objection or remark, and undertook to ride upon it on a Pennsylvania Avenue car, that the defendant was entitled to a verdict.

Taking these two charges together, in connection with the testimony, it is evident that the jury founded their verdict upon the hypothesis contained in the latter, namely, that either he did not get off from the Seventh Street car, but came from the west-bound Avenue car, or that he came with the passengers from that car and presented himself with them to the agent of the defendant in a way to lead him to believe that he came from the Avenue car and desired to proceed on the Seventh Street car, which was confirmed by his taking without objection or remark the Seventh Street car transfer ticket. The testimony also showed that Carpenter had travelled a great deal on the cars of the defendant corporation, was familiar with the manner of transferring passengers, and must have known the character of the ticket which was handed to him if he had paid any attention to it whatever.

The remaining portion of the charge was also favorable to the plaintiff, that is, that if the jury believed that the conduct

of the agents of the company was wanton and malicious, and that they had purposely given him the wrong transfer, and that they had wantonly and maliciously ejected him from the car, then the plaintiff was entitled to recover, and in assessing damages he was entitled not only to compensatory but to vindictive damages.

Taking the testimony, which is all set forth in the record and is but little controverted, together with the charge of the judge, we think it perfectly clear that the jury found a verdict for the defendant on the ground that the plaintiff himself was mainly in fault in regard to the mistake in the transfer ticket, and that no unnecessary force or violence was used in ejecting him from the car. This renders a further consideration of the case unnecessary, and

The judgment of the Supreme Court of the District of Columbia is affirmed.

BRAGG *v.* FITCH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

Argued January 11, 12, 1887. — Decided May 2, 1887.

In view of the previous state of the art, the claims in the patent granted to Charles B. Bristol, May 16, 1865, for an improvement in harness hooks or snaps must be restricted to the precise form and arrangement of parts described in the specification and to the purpose therein indicated.

Bill in equity to restrain alleged infringements of letters-patent. Decree for complainants. Respondents appealed. The case is stated in the opinion of the court. The following are the figures referred to in the opinion.

Fig. 1.

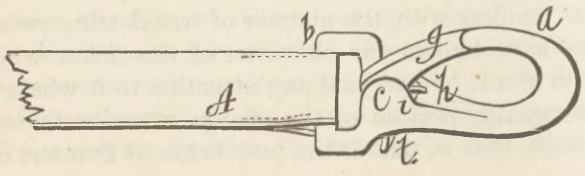


Fig. 2.

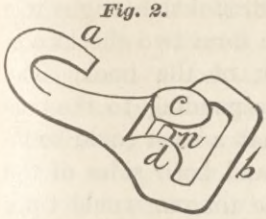


Fig. 3.

Fig. 4.

Mr. William Edgar Simonds for appellants.

Mr. John K. Beach (*Mr. John S. Beach* was with him on the brief) for appellees.

Mr. Justice Bradley delivered the opinion of the court.

This is a suit on a patent granted to Charles B. Bristol, May 16, 1865, for an improvement in harness hooks or snaps; the complainants being assignees of the patent. These hooks are usually attached to the end of a strap or chain for the purpose of fastening it to a ring or staple, as in the case of a tie-strap for fastening a horse to a post. The small hook by which a watch chain is fastened to the ring or stem of the watch is an example. It has a movable part called the tongue, which is connected to the shank of the hook by a pivot, and is kept in place against the end of the hook by the pressure of a spring acting between the shank and the tongue. The tongue may be pressed inward, so as to admit the ring or staple, and is thrust back to its place by the action of the spring. In some form or other, the implement has long been in use. The patent in question relates to the mode of arranging the spring in the tongue, and of attaching both to the shank of the hook. The complainants' expert says: "The invention shown and described in the patent of Bristol is an improvement in that class of snap-hooks in which the tongue is pivoted in a recess between two cheeks in the shank. In this recess a coil spring is arranged around the pivot so that the two ends of the spring bear, one upon the tongue and the other upon the body of the hook, tending to press the tongue up against the end of the hook, but yet permit the tongue to be depressed to open the

hook. In this class of hooks prior to Bristol the tongue was cast with a recess upon its under side to form two cheeks corresponding to the cheeks in the shank of the hook. The cheeks on the tongue were drilled corresponding to the hole through the cheeks in the shank, so that a rivet could be inserted through the sides of the shank and both sides of the tongue to form the pivot on which the tongue would turn. The coil of the spring was arranged around the pivot, the two ends bearing, one upon the shank and one upon the hook, as before described."

The principle of this arrangement was exhibited in many different forms. Sometimes the spring merely passed around the pivot without any coil; sometimes a straight spring was so secured to the one part and made to press against the other, as to effect the same object. One would hardly suppose that a patentable invention could have been made in relation to this little device. But many patents have been, and probably more will be, granted. The Bristol patent, now sued on, is one of the latest in the series which has been brought to our attention.

The particular contrivance which is claimed as an invention in this patent may be described as follows. Instead of having a separate pivot, or pin, to pass through the cheeks or ears of the hook and tongue for the purpose of connecting them together and holding the coil of the spring, a small projection or fulcrum, to answer the purpose of a pivot, is cast as a part of one of the cheeks of the hook, on its inner side, and the cheeks (being made of malleable cast iron) are spread further apart, and the recess between them is thus wider than they are intended to be when the article is finished. The coil of the spring is placed on the projecting fulcrum. The tongue is made with a recess as usual, but one side of this recess is left open, the other side having the ordinary cheek perforated with a hole to admit the fulcrum-pivot. The tongue, thus constructed, is placed in the recess of the hook and slipped over the spring and pivot; and then, by means of a vice or press, the outside cheeks of the hook are squeezed together until the fulcrum-pivot passes through the hole in the cheek of the

tongue, and comes in contact with the opposite cheek of the hook. The patentee, after having described the construction of the several parts, explains the mode of putting them together as follows:

"Having made the parts as before described, I place the spiral spring, Fig. 4, on the projection or pin *n*, Fig. 2, and slip the tongue, Fig. 3, on to the projection or fulcrum-pin *n*, so that the spring, Fig. 4, will rest in and be inclosed by the recess *r*, with the two tangential parts *h* and *i* pointing toward the hook *a*. I then place the article in a proper vice or press and close up the cavity between *c* and *d* until the pin *n* comes in contact with the side or ear *c*, Fig. 2, when the whole will appear as represented in Fig. 1, (except the strap A,) and will be ready for use or sale."

The claim of the patent is as follows, namely:

"What I claim as my invention, and desire to secure by letters-patent, is —

"1. The combination of the tongue *g* with the spiral spring, Fig. 4, when the spring works on the torsion principle and rests in a recess (as *r*), in the rear end of the tongue, substantially as herein described.

"2. The combination of the fulcrum-pin *n* with the tongue *g*, when the pin *n* is cast in one of the ears, and the recess or cavity is fitted to be closed, substantially as herein described."

Only the first claim is relied on in the present suit, as the defendants do not use the fulcrum-pivot, cast with the cheek of the hook, but the ordinary pivot inserted in holes in both cheeks.

The defence is threefold, namely: 1st. That the supposed invention was described in previous patents; 2d. That, in view of the state of the art, the device claimed as new was not a patentable invention; 3d. That, upon a proper construction of the patent, the defendants do not infringe it.

Several prior patents were given in evidence which show, if not an entire anticipation of, at least a very near approach to, the invention claimed.

In 1852, a patent was issued to Palmer & Simmons for an improved hook for whiffletrees, embodying the same prin-

ciple as the snap-hook, in which the recess of the tongue, inclosing the spiral spring, having precisely the same object as the recess of the tongue and spring in Bristol's and other snap-hooks, had but one cheek, the other side of the recess being open until it was applied to the end of the whiffletree supporting the hook, by which it was closed up when the parts were brought together. The connection of the two was made by a pivot passing entirely through the cheek of the tongue and the coil-spring inclosed therein, and into the end of the whiffletree. This pivot had a broad head, which compressed the tongue and kept it in place, in the same manner as is done by the cheek of the hook in Bristol's snap-hook.

In 1859, one Daniel H. Hull patented a trace-fastener, which contained a similar device, so far as the arrangement of the tongue and spring are concerned. The tongue, called in the patent the latch, had a recess containing the spring, which was open on the inside, opposite to a slight recess in the slotted fastener, which corresponded to the hook in the snap-hook. The pivot on which the tongue moved, and which passed through the spiral spring, was of the usual kind, and not cast as part of the fastener or of the latch.

In January, 1864, a patent was granted to one C. S. Abeel for an improvement in safety hooks, in which he dispensed with both the ears of the tongue by the use of one or two straight springs, one end of which was inserted in a slight groove in the recess or chamber of the hook, and the other resting against the tongue either in a groove or against a projection or shoulder.

In December of the same year, a patent was granted to Oliver S. Judd for an improvement in snap-hooks, in which the spring was arranged in the recess of the tongue and operated exactly like the spring in Bristol's hook; the only difference between the two being, that in Judd's hook the pivot passed through both the hook and the tongue, and the latter had two cheeks, one on each side of its recess. The arrangement of the spiral spring, with both tangential ends projecting forward towards the hook, was precisely like Bristol's.

These prior patents exhibit every feature of the Bristol snap-hook, described in the patent sued on, except the single one of the fulcrum-pivot cast as part of the cheek of the hook, and not passing through holes in both ears. This fulcrum is the only novelty shown in the patent; and this is not used by the defendants. The snap-hook made by them has the same pivot which is used in Judd's hook, inserted in the same way, and passing through both cheeks of the hook. The only particular in which it differs from Judd's is, that the tongue has but one cheek, and only one end of the coiled spring projects forward, towards the hook, resting against the tongue; whilst the other end projects backward, and presses against the side of the recess in the tongue, which is curved around and prolonged sufficiently for this purpose. It differs in two respects from the Bristol snap-hook, to wit, in not using the fixed fulcrum cast as part of the cheek, and in not having both tangential ends of the spring projecting forward towards the hook, but having one of the ends projecting backwards and pressing, not against the tongue itself, but against the opposite side of its recess, prolonged sufficently for the purpose.

It is obvious from the foregoing review of prior patents, that the invention of Bristol, if his snap-hook contains a patentable invention, is but one in a series of improvements all having the same general object and purpose; and that in construing the claims of his patent they must be restricted to the precise form and arrangement of parts described in his specification, and to the purpose indicated therein. As we have seen, with one exception, (the solid pivot,) all the parts are old, and have been used in combination in other things of the same general character. The use of a recess in the tongue with one of its ears or cheeks removed was to adapt it to the new element referred to, namely, the solid pivot; and although the first claim of the patent is for the tongue thus constructed, in combination with the spiral spring, as arranged in connection with it, yet this claim must be construed in reference to the purpose for which the tongue and spring, thus arranged, were intended, namely, for adjustment upon the solid pivot. Without this relative purpose, the combination

of the tongue and spring, by itself, would be anticipated by the patent of Palmer and Simmons, and that of Hull. If it has any novelty, it consists in its new application to the snap-hook as devised by Bristol; and this was a snap-hook provided with the peculiar solid pivot, or fulcrum-pin, which is the subject of his second claim, and to which, as we have seen, the form and arrangement of the tongue and spring were specially adapted, and requisite to its beneficial use. This necessary restriction of the first claim renders it clear that it is not infringed by the defendants; for, as before stated, they do not use the solid pivot, but the old and long-used pin, passing through both ears or cheeks of the tongue and the hook.

The defendants also use a different device from that described by Bristol, in the arrangement of the spiral spring, the two ends of which, instead of pointing towards the hook, point in different directions, one towards the hook and pressing against the body of it, and the other in the opposite direction, and pressing against the side of the recess in the tongue, which is prolonged and curved around for that purpose.

On the whole view of the case, we are satisfied that the defendants do not infringe the patent sued on when construed as it must be to give it any validity.

The decision of the Circuit Court must, therefore, be reversed, and the case remanded, with instructions to dismiss the bill.

McCOY *v.* NELSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Argued April 22, 1887. — Decided May 2, 1887.

A bill in equity for the infringement of letters-patent for an invention *held*, on a general demurrer, to be in proper form; and the requisites of such a bill considered.

BILL in equity for the infringement of letters-patent. The bill was dismissed on general demurrer. The case is stated in the opinion of the court.

Mr. Leigh Robinson for appellant.

No appearance for appellee.

Mr. Justice Blatchford delivered the opinion of the court.

This is a bill in equity, filed in the Circuit Court of the United States for the District of Colorado, by George C. Mc Coy against Frederick Nelson, for the infringement of letters-patent of the United States, No. 254,993, granted to McCoy, March 14, 1882, for an "improvement in boots." The bill sets forth a copy of the patent, and of its specification and drawings, at length. The defendant interposed a general demurrer to the bill, for want of equity, specifying no grounds of demurrer. The court sustained the demurrer and entered a decree dismissing the bill, from which the plaintiff has appealed.

We are not furnished with a copy of any opinion of the Circuit Court, nor with any brief from the appellee, and the case was not orally argued on his part. We are left, therefore, without information as to the grounds upon which the demurrer was sustained.

The bill alleges that the plaintiff "is the original and first inventor of a new and useful improvement and invention in boots, which are fully and particularly described in the letters-patent hereinafter mentioned, and which had not been known or used before his said invention." It then sets out that he applied for and obtained the patent. The patent states, on its face, that he has applied for a patent "for an alleged new and useful improvement in boots, a description of which invention is contained in the specifications, of which a copy is hereto annexed and made a part hereof." The patent grants to him, his heirs or assigns, for seventeen years from its date, "the exclusive right to make and vend the said invention throughout the United States and Territories." The specification states that he has "invented a new and improved boot, of which the following is a full, clear and exact description." It says: "The object of my invention is the production of a boot of novel and improved construction, as herein-

after described and claimed." It refers to seven figures of drawings which accompany the specification, one of which "is a perspective view of my improved boot." It states that "the sole and heel of the boot are of ordinary form, and the upper and counter may be secured to the sole by any of the well-known and common means." It then describes the vamp, the quarters which form the leg, the mode of sewing the quarters together, the hooks and holes for lacing and the lacing device, and the strip secured over the front seam, and the leather tongue which closes the opening in front in the main material of the leg and is itself secured to the leg pieces or quarters and the vamp. The claim is as follows: "Having thus described my invention, I claim as new, and desire to secure by letters-patent, the herein-described boot, consisting of the vamp B, the quarters *d*, sewed together in the back, and a short distance in front from the top down, and provided with the hooks *e*, holes *i*, and a suitable lacing device, the strip *f*, secured over the said front seam, and the tongue G, secured to the said leg pieces and vamp, substantially as set forth." The bill then alleges that the plaintiff was and is the owner of the patent; that he has invested and expended large sums of money for the purpose of carrying on the business of making and selling boots containing the invention; that the invention has been of great utility; that boots were made according to it, and containing it, and sold by him, to the great advantage of the public; that the public have generally acknowledged and acquiesced in the validity of the patent and in his rights; that the defendant has manufactured, used and vended to others to be used, boots containing and embracing the invention, in the District of Colorado, without the license of the plaintiff, and in violation of his rights, and in infringement of the patent, with full knowledge of those rights, and to the injury of the plaintiff, whereby he has been and still is being deprived of profits which he otherwise would have obtained; and that the defendant has made and sold large quantities of said boots, and is still engaged in selling the same, and has a large quantity thereof on hand, which he is offering for sale, and has made large profits from such sales. The bill prays

for an answer on oath; and that the defendant may account for and pay to the plaintiff the profits acquired by the defendant, and the damages suffered by the plaintiff, from the unlawful acts of the defendant. It also prays for an injunction.

Groping in the dark and grappling with shadows, we are unable to perceive the objection to this bill. The brief of the appellant does not state upon what ground it is understood the court below proceeded. If it be suggested that the claim of the patent is for the boot described, and that the bill merely alleges that the defendant has made, used and sold boots containing and embracing the invention covered by the patent, instead of alleging that the defendant has made, used and sold the invention or the patented boot, we are of opinion that there is no force in the objection. If the boot made, used and sold by the defendant is not a boot consisting substantially of the parts mentioned in the claim of the patent, it does not infringe the patent, and is not, in judgment of law, a boot containing and embracing the invention, in the language of the bill. Although the claim of the patent is a claim to the described boot, consisting of the elements specified, the invention patented is an "improvement in boots," as stated in the patent, and any boot which contains that improvement, according to the terms of the claim, infringes the patent and is a boot containing and embracing the invention patented. The bill is entirely sufficient to put the defendant upon his answer, and the rights of the parties will be properly and adequately adjusted in the further proceedings in the cause. The bill is in accordance with approved precedents, and is in the usual form.

The patent having been issued fifteen months before the bill was filed, and having nearly sixteen years then to run, and the bill alleging that the public have generally acknowledged and acquiesced in the validity of the patent, and that the invention has been put in practice by the plaintiff, and has been of great utility, it was not necessary to show a recovery at law, to warrant jurisdiction in equity, for an injunction and an account. *Root* v. *Railway Co.*, 105 U. S. 189, 205.

Statement of Facts.

The decree of the Circuit Court is reversed, and the case is remanded to that court, with a direction to take such further proceedings as shall be in conformity with this opinion.

WRIGHT *v.* ROSEBERRY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Submitted March 21, 1887. — Decided May 2, 1887.

The grant of swamp and overflowed lands to the several states by act of September 28, 1850, is one *in præsenti*, passing title to the lands of the character therein described, from its date, and requiring only identification thereof to render such title perfect.

Such identification by the Secretary of the Interior is conclusive against collateral attack as being the judgment of the special tribunal on which such duty was imposed.

On neglect or failure of that officer to make such designation, it is competent for the grantees of the State to identify the lands in any other appropriate mode to prevent their rights from being defeated.

After segregation of the lands by the State, and adoption of the segregation surveys by the proper Federal officers, the right of the State's grantees to maintain an action for recovery thereof cannot be defeated because such lands have not been certified or patented to the State.

The issue of patents for these lands to defendants or their grantors, under the preëmption laws, upon claims initiated subsequent to the swamp grant to the State is not conclusive at law as against parties claiming under such grant, and in an action for their possession evidence is admissible to determine whether or not the lands were in fact swamp and overflowed at the date of the swamp land grant: if proved to have been such, the rights of subsequent claimants under other laws are subordinate thereto.

The provisions contained in § 1 of the act of July 23, 1866, "to quiet land titles in California," do not relate to the swamp lands granted to the State by the act of September 8, 1850; the provisions in §§ 4 and 5 relate to swamp lands.

The legislation of Congress respecting swamp lands, the Departmental construction of that legislation, the line of decisions by this court respecting it, and the decisions of the highest courts of many of the states concerning it, stated.

THIS was an action to recover possession of a tract of land situated in the county of Yolo, in the State of California,

consisting, according to the public surveys, of portions of sections 24, 25 and 36 of township 11 north, range 2 east, in that county, and embracing 560 acres. The land was particularly described as follows: The north half of the southeast quarter, and the southeast quarter of the southeast quarter of section twenty-four (24), the east half of the northeast quarter and the southwest quarter of the northeast quarter of section twenty-five (25), the southeast quarter of section twenty-five (25), and the northeast quarter of section thirty-six (36), all in township eleven (11) north, range two (2) east, Mount Diablo base and meridian. It was alleged to be swamp and overflowed land, which was granted to the state by the act of Congress of September 28, 1850, "to enable the state of Arkansas and other states to reclaim the 'Swamp Lands,' within their limits." 9 Stat. 519. The complaint was in the usual form in such actions, alleging the plaintiff's seizin in fee of the land and his right of possession, the unlawful entry thereon of the defendants and their ousting him therefrom, and their continued withholding of the possession to his damage of $1000. It also alleged that the rents and profits of the land were of the value of $560 a year. The prayer was for judgment of restitution of the premises and for the damages, rents and profits claimed.

Two of the defendants united in their answer, one of them being a tenant of the other; the other defendants answered separately. All denied the allegations of the complaint, and, except in the case of the tenant, asserted ownership in fee of portions of the demanded premises, which they described in their respective answers; and all set up the statute of limitations in bar of the action.

The action was twice tried by the state District Court in which it was commenced, and, by stipulation of parties, without a jury. At both trials the plaintiff asserted title to the premises as swamp and overflowed lands by conveyance from parties who had purchased them from the State. The defendants claimed the premises through patents of the United States, issued under the preëmption laws to them or to parties from whom they derived their interest. On the first trial, the

court found that 160 acres were swamp and overflowed land on the 28th of September, 1850, within the meaning of the act of Congress of that date, and gave judgment in favor of the plaintiff for their possession; but, as to the other portions of the premises, the court failed to find whether or not the plaintiff was the owner thereof or entitled to their possession. For this failure the Supreme Court of the state, on appeal, reversed the judgment, and remanded the cause to the District Court, with directions to find upon those issues from the evidence already taken, and such further evidence as might be adduced; and to render judgment upon the whole case. Upon the second trial thus ordered, further testimony was accordingly taken. The court thereupon set aside its previous findings, found on all the issues in favor of the defendants, and gave judgment in their favor. On appeal to the Supreme Court this judgment was affirmed.

Mr. John Mullan for plaintiff in error.

Mr. W. C. Belcher for defendant in error.

I. Under the act of Congress of September 28, 1850, granting swamp and overflowed lands to the states, the Secretary of the Interior is the officer, and his department the tribunal, to determine what lands are within the grant, and his decision is conclusive. *French* v. *Fyan*, 93 U. S. 169, 171. That decision has been many times recognized and affirmed, and by it the rule was settled that when the Land Department has issued a patent for any given tract of land as high land, and particularly where, as here, it has issued a patent after having made special inquiry and examination, through its subordinate officers, to determine the character of the land with reference to the grant, the question of character is conclusively settled in favor of the patentee, and cannot be reëxamined in an action at law.

Here we have as evidence of the decision of the Department of the Interior as to the character of these lands: First. Patents of the United States to defendants as preëmptors;

Second. Report of the United States Surveyor General of his investigation made upon the application of the plaintiff and the decision of the Commissioner upon that report; Third. Decision of the Commissioner and Secretary of the Interior refusing to list the land to the state upon its application made by the state Surveyor General.

II. In an action of ejectment, patents of the United States for the lands involved are conclusive evidence of the legal title. *French* v. *Fyan*, 93 U. S. 169; *Johnson* v. *Towsley*, 13 Wall. 72; *Leese* v. *Clark*, 18 Cal. 535, 572; *Miller* v. *Dale*, 44 Cal. 562; *Churchill* v. *Anderson*, 56 Cal. 55; *Gibson* v. *Chouteau*, 13 Wall. 92, 102; *Bagnell* v. *Broderick*, 13. Pet. 436; *Patterson* v. *Tatum*, 3 Sawyer, 164, 172; *Moore* v. *Robbins*, 96 U. S. 530; *Cahn* v. *Barnes*, 7 Sawyer, 48.

In *French* v. *Fyan* it appeared that the United States had issued a patent to the state, upon its request, for the land as swamp and overflowed land under the act of September 28, 1850; that Congress had in 1852 made a grant of land to the Missouri Pacific Railroad Company, and the land involved had been surveyed and returned as high land, and had been certified by the Commissioner to the railroad company as part of the land granted to it. The plaintiff claimed under the certificate and grant to the railroad company, the defendants under the state; and the party resisting the patent offered to prove by witnesses that the land was not in fact swamp and overflowed land within the meaning of the act, while in our case the plaintiff sought to prove that the land was swamp and overflowed land within the meaning of the act by witnesses, by the state segregation map, and the new plat constructed by the United States Surveyor General under the fourth section of the act of July 23, 1866.

In *Leese* v. *Clark*, 18 Cal. 572, Mr. Justice Field, then Chief Justice of the Supreme Court of California, speaking of the conclusive character of a patent, says: "Upon all the matters of fact and law essential to authorize its issuance, it purports absolute verity; *and it can only be vacated and set aside by direct proceedings instituted by the government, or by parties acting in the name and by the authority of the government.*

Until thus vacated it is conclusive, not only as between the patentee and the government, but between parties claiming in privity with either by title subsequent." And in *Gibson* v. *Chouteau*, 13 Wall. 102, the same learned judge says: "But in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title. So, also, in the action of ejectment in the state courts, when the question presented is whether the plaintiff or defendant has the superior legal title from the United States, the patent must prevail."

Miller v. *Dale*, 44 Cal. 562, was ejectment for land in Santa Clara County. The land was embraced within the calls of two Mexican grants — *Las Animas* and *El Solis* — both of which had been finally confirmed by the proper tribunals of the United States. For *El Solis* a patent had been issued. For *Las Animas* the survey had been finally approved by the United States District and Circuit Courts, but no patent had been issued. The plaintiff, claiming under the *Las Animas*, sought to attack the *El Solis* patent, under which the defendants claimed, on the ground that the confirmation of the grant had been procured by false testimony, but it was held that the patent could not be collaterally attacked, and that it was, so long as it remained unvacated, conclusive against the government and against all parties claiming under the government by title subsequent. The judgment in that case was reviewed in this court, and affirmed in *Miller* v. *Dale*, 92 U. S. 473.

Here the issuing of the patent was, by the act of Congress, made to depend upon the existence of particular facts in reference to the condition of the land — whether it was high land, suited to cultivation, and open to settlement and purchase under the preëmption laws. The Department of the Interior had been appointed to ascertain and determine the facts, and had given its decision, and upon that decision the patents had been issued, and they were not open to collateral attack.

The rights of the defendants were based upon settlements made and declaratory statements filed prior to the passage of the act of July 23, 1866, and their rights were saved by special

provisions of that act. Roseberry's patent for the southeast quarter of section twenty-five was issued prior to the passage of that act.

In *Cahn* v. *Barnes*, decided in 1881, in the United States Circuit Court for the District of Oregon, the plaintiff claimed under a patent from the United States issued under a wagon road grant to the state of Oregon. The defendant claimed under a certificate of purchase from the state, for the land as swamp and overflowed land. The facts in that case were in many respects like the facts in this. There the state had selected the land as swamp and overflowed and issued to the defendant its certificate of purchase, but the land had not been listed or patented to the state as swamp. There too the United States had issued a patent for the land as high land.

The reasoning of the learned judge in that case applies very exactly to this case, and here as there, the patent of the United States must be held conclusive evidence that the lands patented as agricultural lands, were not and are not swamp land.

There the Secretary of the Interior had not been asked to determine the character, and list the lands. Here investigations had been had and reports made at the instance of the state, and after investigation, the Secretary had refused to list or certify the land to the state. The patents were not open to collateral attack. They were issued under authority of law, and by the officers to whom the law intrusted "the issuing of patents for all grants of land under the authority of the government," and for lands the title to which was in the government. If there was any error, it was an error of judgment in the Secretary, in determining the actual character of the land, but that was an error which a court of law cannot correct. The act of July 23, 1866, could not affect the case, because the rights of the defendants were initiated before its passage, and were specially protected by its provisions.

III. There was no error in the rulings of the District Court as to the admissibility of evidence.

First. Plaintiff asked the witness Twitchell whether the map filed in the Surveyor General's office, by Mathews, had

been recognized as the segregation map of Yolo County. Recognition by the officers of the Surveyor General's office could not give character to the map. The map itself was in evidence, and was allowed to tell its own story. It was offered in evidence to show that the land in controversy had been actually surveyed and segregated as swamp and overflowed land by Mathews, as county surveyor, in 1862. It must speak for itself, and recognition by the Surveyor General could add nothing to it.

Second. The documentary evidence offered by the defendants and admitted against the objections of the plaintiff was admissible, because it showed that the Land Department and the Secretary of the Interior, as the head of that department, had, upon application of the state, refused to list or patent the land involved to the state.

Mr. Justice Field, after making the foregoing statement of the case, delivered the opinion of the court.

It does not distinctly appear what caused the District Court to change its first decision with respect to those lands, which it had originally held to be swamp and overflowed; but, as it admitted in evidence the patents of the United States, and held that they passed the title to the defendants, it probably had reached the conclusion which the Supreme Court subsequently announced, that the plaintiff could not maintain an action upon the title to swamp and overflowed lands until they had been certified as such to the state, pursuant to the fourth section of the act of Congress of July 23, 1866, "to quiet land titles in California." For want of such certificate, the court decided that the title to the demanded premises never vested in the state, and that she could not convey a title to the plaintiff upon which he could maintain an action of ejectment against persons in possession under patents of the United States. This ruling constitutes the alleged error for which a reversal is sought. To determine its correctness, it will be necessary to consider the nature of the grant to the state of the swamp and overflowed lands, the proceedings

taken under the laws of the state and of the United States to ascertain and define their boundaries, and the effect of the act of July 23, 1866, and of § 2488 of the Revised Statutes as confirmatory of previous segregations by the state. The following is the swamp land act of September 28, 1850:

"An Act to enable the State of Arkansas and other States to reclaim the 'Swamp Lands' within their limits.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be and the same are hereby granted to said state.

"Sec. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described, as aforesaid, and transmit the same to the governor of the state of Arkansas, and at the request of said governor, cause a patent to be issued to the state therefor; and on that patent the fee simple to the lands shall vest in the said state of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp

and overflowed lands, known and designated as aforesaid, may be situated." 9 Stat. 519.

Soon after the passage of this act, the question arose as to the time the grant took effect; whether at the date of the act, or on the issue of the patent to the state upon the request of the governor, after the list and plats of the lands were made out by the Secretary of the Interior and transmitted to him. The question was one of great importance to all the states in which there were swamp and overflowed lands. These lands amounted to many millions of acres. In California alone there were, according to the reports of the Land Department, nearly two millions of acres.

The object of the grant, as stated in the act, was to enable the several states to which it was made, to construct the necessary levees and drains to reclaim the lands; and the act required the proceeds from them, whether from their sale or other disposition, to be used, so far as necessary, exclusively for that purpose. The early reclamation of the lands was of great importance to the states, not only on account of their extraordinary fertility when once reclaimed, but for the reason that until then they were the cause of malarial fevers and diseases in the neighborhood.

The language of the first section of the act indicates a grant *in præsenti* to each state of lands within its limits of the character described. Its words "shall be and are hereby granted" import an immediate transfer of interest, not a promise of a transfer in the future. It was only when the other sections of the act were read that a doubt was raised as to the immediate operation of the act. On the one hand, it was contended that these sections postponed the vesting of title in the state until the lands granted were identified, and a patent of the United States for them was issued. On the other hand, it was insisted that effect must be given to the clear words of the granting clause of the first section, which, *ex vi termini*, import the passing of a present interest, and that, in consistency with them, the other provisions of the act should be regarded as simply providing the mode of identifying the lands, and furnishing documentary evidence of their

identification, and not as a limitation upon vesting the right to them in the state, as this would make the investiture dependent upon the request of the governor, and not upon the act of Congress. It was also urged that identification of the lands could be made in a majority of instances from simple examination of them, and that no policy of the government could be advanced by postponing the passing of the title until the identification by the Secretary of the Interior; and that the clause providing, that upon the issue of the patent the fee should pass, was merely declaratory of the nature of the title, the patent operating merely by way of further assurance.

The question thus brought to the attention of the Department, under whose supervision the act was to be carried into effect, was one upon which men might very well differ, but after its solution had been reached, and the conclusion was acted upon, necessarily affecting titles to immense tracts of land, there should be the clearest evidence of error, as well as the strongest reasons of policy and justice controlling, before a departure from it should be sanctioned.

There are numerous cases in the history of the country where Congress, after confirming to parties title to lands, has directed that patents of the United States should be issued to them; yet, it has been held that the patent in such cases operated merely as record evidence of the title, and added nothing to the title itself. An illustration of this is presented in the case of claims confirmed to lands in the Northwest Territory which originated previously to its cession to the United States. By the act of Congress of March 26, 1804, 2 Stat. 277, c. 35, every person claiming lands within certain designated limits of that territory by virtue of a legal grant made by the French government prior to the Treaty of Paris of the 10th of February, 1763; or by the British government subsequent to that period, and prior to the treaty of peace between the United States and Great Britain on the 3d of September, 1783; or by virtue of any resolution or act of Congress subsequent to that treaty, was required to deliver, on or before the first of January, 1805, to the register of the land office of the district in which the land was situated, a notice stating the

nature and extent of his claim, together with a plat of the tract or tracts claimed. The register of the land office and the receiver of public moneys were constituted commissioners within their respective districts for the purpose of examining the claims. It was made their duty to hear in a summary manner all matters respecting them, to examine witnesses, and to take any testimony that might be adduced before them and decide thereon according to justice and equity, and to transmit a transcript of their decisions in favor of claimants to the Secretary of the Treasury, who was required to lay it before Congress at the ensuing session.

Among the claims presented under this act was one by the heirs of Jean Baptiste Tongas for lands in the neighborhood of Vincennes, the claim being founded upon an ancient grant to their ancestor. The commissioners decided in favor of the heirs and confirmed their claim, and transmitted a transcript of their decision to the Secretary of the Treasury, who laid the same before Congress. By the act of March 3, 1807, 2 Stat. 446, c. 47, this and other decisions in favor of persons claiming lands in the same district of Vincennes, transmitted to the Secretary of the Treasury, were confirmed. The act declared that every person, or his legal representative, whose claim was confirmed, and who had not previously obtained a patent therefor from the governor of the territory northwest of Ohio, or of Indiana Territory, should, whenever his claim was located and surveyed, have a right to receive from the register of the land office at Vincennes a certificate, which should entitle him to a patent for his land, to be issued to him in like manner as is provided by law "for the other lands of the United States." A survey of the tract thus confirmed was made in 1820, but no patent was issued until 1872, when one was issued, reciting the confirmation, by the act of 1807, of the decision of the Commissioners under the act of 1804. The patent purported "to give and grant" to the heirs of Tongas the tract in question in fee. A party claiming under the heirs brought ejectment for the premises. The defendant claimed as tenant under one who had been in actual possession under claim and color of title for thirty years. The

question for decision was, when did the title to the land vest in the heirs of Tongas. The court below held that it vested by the act of confirmation of 1807, when the land was located and surveyed in 1820, and that the patent was not itself the grant of the land by the United States, but merely evidence that a grant had been made to the heirs of Tongas. The defendant, therefore, had judgment. The case being brought to this court, the judgment was affirmed. *Langdeau* v. *Hanes*, 21 Wall. 521. In deciding the case, the court said:

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government. In the present case the patent would have been of great value to the claimants, as record evidence of the ancient possession and title of their ancestor, and of the recognition and confirmation by the United States, and would have obviated, in any controversies at law respecting the land, the necessity of other proof, and would thus have been to them an instrument of quiet and security. But it would have added nothing to the force of the confirmation. The survey required for the patent was only to secure certainty of description in the instrument, and to inform the government of the quantity reserved to private parties from the domain ceded by Virginia."

The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the swamp land act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the

swamp land act — "there is hereby granted." Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult. Thus, in the case of *Leavenworth, Lawrence and Galveston Railroad Company* v. *United States*, 92 U. S. 733, the language was, "There be and is hereby granted to the state of Kansas," and in reference to it the court said: "It creates an immediate interest and does not indicate a purpose to give in future. 'There be and is hereby granted' are words of absolute donation and import a grant *in præsenti*. This court has held that they can have no other meaning, and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant. . . . They vest a present title in the state of Kansas, though a survey of the lands and a location of the road are necessary to give precision to it, and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them." See, also, *Railroad Company* v. *Baldwin*, 103 U. S. 426; *Missouri, Kansas and Texas Railway Company* v. *Kansas Pacific Railway Company*, 97 U. S. 491; *Schulenberg* v. *Harriman*, 21 Wall. 44, 60; *Rutherford* v. *Greene's Heirs*, 2 Wheat. 196.

It is plain that the difficulty of identifying the swamp and overflowed lands could not defeat or impair the effect of the granting clause, by whomsoever such identification was required to be made. When identified, the title would become perfect as of the date of the act. The patent would be evidence of such identification and declaratory of the title conveyed. It would establish definitely the extent and boundaries of the swamp and overflowed lands in any township, and thus render it unnecessary to resort to oral evidence on that subject. It would settle what otherwise might always be a mooted point, whether the greater part of any legal subdivision was so wet and unfit for cultivation as to carry the whole subdivision into the list. The determination of the Secretary upon these matters, as shown by the patent, would

be conclusive as against any collateral attacks, he being the officer to whose supervision and control the matter is especially confided. The patent would thus be an invaluable muniment of title and a source of quiet and peace to its possessor. But the right of the state under the first section would not be enlarged by the action of the Secretary, except as to land, not swamp or overflowed, contained in a legal subdivision, as mentioned in the fourth section; nor could it be defeated, in regard to the swamp and overflowed lands, by his refusal to have the required list made out, or the patent issued, notwithstanding the delays and embarrassments which might ensue.

The conclusion which the Land Department reached upon its examination of the character of the grant soon after the passage of the act, was that the title passed to the state at the date of the act. In a communication to the Commissioner of the General Land Office, under date of December 23, 1851, Mr. Stuart, then Secretary of the Interior, referring to the act of 1850 and the act of 1849 to aid Louisiana to drain her swamp lands, and stating that the first question involved was as to the period when the grants took effect — whether at the date of the law, or at the date of the approval of the selections by the Secretary — said: "In each case, the granting clause is in the first section, and the words employed, viz., 'are hereby granted,' seem to me to import a grant *in præsenti*. They confer the right to the land, though other proceedings are necessary to perfect the title. When the selections are made and approved, or the patent issued, the title therefor becomes perfect, and has relation back to the date of the grant." And, further, "As the grants are regarded as taking effect from the date of the laws making them respectively, and as vesting the inchoate title in the states, it follows that any subsequent sale or location of swamp or overflowed lands must be held to be illegal and the purchase money refunded, or a change of location ordered." Lester's Land Laws, 549, No. 578.

This construction of the grant has been followed by the Secretary's successors to this day. In a communication to the Commissioner of the General Land Office, April 19, 1877, Secretary Schurz said: "The legal character of this grant (of

1850) has often been passed upon by the courts, and it has been uniformly held that the act was a present grant, vesting in the state, *proprio vigore* from the day of its date, title to all the land of the particular description therein designated, wanting nothing but the definition of the boundaries to make it perfect." And, therefore, he held that swamp lands were not, in March, 1853, when the preëmption laws were extended to California, public lands, and for that reason could not be entered and sold under those laws. "The act of September 28, 1850," he added, "was notice to the world that all of the swampy lands in California were thereby granted *in præsenti* to the state, and were not subject to preëmption, entry or sale thereafter; and the person who files a declaratory statement on lands actually swampy, does so with full notice that they are not public lands and that he cannot obtain any right thereby." Copp's Public Land Laws, vol. 2, p. 1048.

In a communication to the Commissioner of February 25, 1886, Secretary Lamar said: "The principle has been formerly established by the decisions of the courts and of this Department that the grant of swamp lands made to the several states was a grant *in præsenti*, and conferred a present vested right to such lands as of the date of the grant, and that the field notes of survey may be taken as a basis in determining the character of the land if the state so selects." Decisions of Dept. Interior, vol. 4, 415.

A similar construction of the grant was given by Attorney General Black in an official communication to the Secretary of the Interior, under date of November 10, 1858. In February, 1853, Congress had made a grant of land to the states of Arkansas and Missouri to aid in the construction of a railroad, and under this grant a part of the lands previously granted to the state of Arkansas by the act of September 28, 1850, under the designation of swamp lands, was included; and the question asked of the Attorney General was, which of the two acts gave the better title. In reply, he said: "Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail; *prior*

in tempore potior est in jure. This difficulty, therefore, is solved if the mere grant [of 1850], as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant by Congress does of itself, *proprio vigore*, pass to the grantee all the estate which the United States had in the subject matter of the grant, except what is expressly excepted. I refer you to that opinion for the reasons and authorities upon which the principle is grounded. It is not necessary that the patent should issue before the title vests in the State under the act of 1850. The act of Congress was itself a present grant, wanting nothing but a definition of boundaries to make it perfect, and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands and cause a patent to be issued therefor. But when a party is authorized to demand a patent for land his title is vested as much as if he had the patent itself, which is but evidence of his title." 9 Opinions Attorneys General, 254.

The same view of the act as a present grant, vesting in the state from its date the title to all the land within its limits of the particular description designated, wanting only a definition of boundaries to render the title perfect, was taken at an early period by the highest courts of several states within which swamp and overflowed lands existed. It was so held by the Supreme Court of Arkansas in 1859, in *Fletcher* v. *Pool*, 20 Ark. 100; in 1866, in *Branch* v. *Mitchell*, 24 Ark. 431, 444; and in 1874 in *Ringo's Executor* v. *Rotan's Heirs*, 29 Ark. 56.

In *Fletcher* v. *Pool*, the court said: "That the act was a present grant vesting in the State, *proprio vigore*, from the day of its date, title to all the land of the particular description therein designated wanting nothing but the definition of boundaries to make it perfect, no doubts can be entertained. The object of the second section was not to postpone the vestiture of title in the State until a patent should issue, but was to provide for the ascertainment of boundaries and to prevent

a premature interference with the lands by the state legislature before they were so designated as to avoid mistake and confusion."

In *Branch* v. *Mitchell*, the court said: "We continue satisfied with the decisions heretofore made; and again hold that all the lands in the state, which were really and in fact swamp and overflowed, and thereby unfit for cultivation, passed to and vested in the State, on the 28th of September, 1850. The case is the same as if the grant had been of all the prairie land, or all the woodland, or all the alluvial land, in the state; the difficulty of ascertainment of its character not affecting the question. The words of grant, the operative words, are direct and positive: 'Shall be and the same are hereby granted to the State;' and the provision of the second section, that the Secretary of the Interior should make out and transmit to the governor a list and plats of the land described, and at the request of the governor cause a patent to issue to the State; and that 'on that patent the fee simple to said lands shall vest in the said State,' can no more be held to limit the effect of the present grant in the first section, than if, in a deed, after immediate and express conveyance of lands by some general description, it should be provided that, when the numbers should be ascertained, another deed should be made, 'on which the fee simple should vest.' This would make the title of the State to any of the land depend on the request of the governor for a patent. The words of the second section must be held to be simply a definition of the *nature* of the title which the State took under the grant, and not a postponement of the period at which the title should vest." 24 Ark. 444, 445.

And in *Ringo's Executor* v. *Rotan's Heirs*, the court held that the title of the State to the swamp and overflowed lands granted to her by the act of September 28, 1850, accrued from the date of the act, and that a title derived from the State took precedence over a grant by the United States subsequent to that time.

The same view was held by the Supreme Court of California in 1858, in *Owens* v. *Jackson*, 9 Cal. 322; and in *Summers* v. *Dickinson*, 9 Cal. 554; and in 1864 in *Kernan* v.

Griffith, 27 Cal. 87; and in 1882 was assumed to be the correct view in *Sacramento Valley Reclamation Co.* v. *Cook*, 61 Cal. 341. In the first of these cases, which was an action for the possession of swamp and overflowed lands held under a patent of the State, the defendant demurred to the complaint, on the ground that it did not show that the land had been surveyed and patented to the State. The demurrer was sustained in the court below, but the Supreme Court reversed the decision, holding that the State had the right to dispose of lands of that character granted to her by the act of 1850, prior to the patent of the United States. "The act of Congress," said the court, "describes the land, not by specific boundaries, but by its quality, and is a legislative grant of all the public lands within the state of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive as between the United States and the State." The same conclusion was reached in 1861 by the Supreme Court of Iowa, in *Allison* v. *Halfacre*, 11 Iowa, 450, which was subsequently followed in all its decisions on the subject.

At a later day, the Supreme Courts of Missouri and Oregon held the same doctrine. *Clarkson* v. *Buchanan*, 53 Missouri, 563; *Campbell* v. *Wortman*, 58 Missouri, 258; *Gaston* v. *Stott*, 5 Oregon, 48. The Supreme Court of Illinois, in 1863, expressed the same view in *Supervisors* v. *State's Attorney*, 31 Ill. 68; then receded from it in *Grantham* v. *Atkins*, 63 Ill. 359; and, in 1873, in *Thompson* v. *Prince*, 67 Ill. 281; but returned to its first conclusion, in 1875, in *Keller* v. *Brickey*, 78 Ill. 133.

The question came before this court at the December term, 1869, in *Railroad Company* v. *Smith*, 9 Wall. 95, and the same doctrine as to the character of the grant was affirmed. On the 10th of June, 1852, Congress had made to the State of Missouri a grant of land to aid in the construction of certain railroads, and the legislature of the state had conveyed the land to the Hannibal and St. Joseph Railroad Company. One Smith held certain swamp and overflowed lands, which he

had obtained from the State, and the question presented was whether the grant to the State in aid of the railroads covered the swamp and overflowed lands granted to her by the act of September 28, 1850, the latter not having been certified to the State by the Secretary of the Interior, nor patented to her. After referring to the first section the court said: "Here is a present grant by Congress of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges and sections to identify them, as coming within it. In this respect it is precisely like the railroad grants, which only become certain by the location of the road." And after stating that it was the duty of the Secretary of the Interior to ascertain the character of the lands as swamp and overflowed, and to furnish the State with evidence of it, the court continued: "Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the states to them could not be defeated by that delay." The court added, that, as the Secretary of the Interior had no satisfactory evidence under his control to enable him to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge would enable them to report as to the character of the tracts claimed to be swamp and overflowed; "that the matter to be shown was one of observation and examination, and, whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose." And it was held that the grant in aid of the railroads did not include the swamp and overflowed lands.

In *French* v. *Fyan*, 93 U. S. 169, 170, which was before this court at October term, 1876, the same view was taken of the grant, and the effect to be given to a patent of the United

States for swamp lands was stated. That was an action of ejectment for such lands for which a patent had been issued to the State of Missouri under the act of 1850. The lands had been conveyed to the Missouri Pacific Railroad Company by the State as part of the land granted to aid in the construction of its road by the act of June 10, 1862, and the plaintiff had by purchase become vested with the title of the company. To overcome the *prima facie* case made by him the defendant gave in evidence the patent of the State under the swamp land act of 1850, from which he traced title by regular conveyances. The plaintiff then offered to prove by witnesses who had known the character of the land from 1849 down to the time of the trial, that the land was not swamp and overflowed, and made unfit thereby for cultivation, and that, since 1849, the greater part was not, and never had been, in that condition. The court below held that the question was concluded by the patent of the United States to the State for the land as swamp land under the act of September 28, 1850, and rejected the testimony. The admissibility of the testimony was thus presented for determination. In giving our decision we said: "This court has decided more than once that the swamp land act was a grant *in præsenti*, by which the title to those lands passed at once to the State in which they lay, except as to the States admitted into the Union after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant. As that act was passed two years prior to the act granting lands to the State of Missouri for the benefit of the railroad, the defendant had the better title on the face of the papers, notwithstanding the certificate to the railroad company for the same land was issued three years before the patent to the State under the act of 1850. For, while the title under the swamp land act, being a present grant, takes effect as of the date of that act, or of the admission of the State into the Union when this occurred afterwards, there can be no claim of an earlier date than that of the act 1852, two years later, for the inception of the title of the railroad company." And

upon the admissibility of parol testimony to show that the land in the patent was not swamp land, the court said that by the second section of the act the power and duty were conferred upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on that subject was to be controlling. The parol evidence, therefore, was held to be inadmissible. 93 U. S. 172.

In commenting upon the case of *Railroad* v. *Smith*, upon which reliance was placed for the admission of the parol testimony, the court said: "The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selections or lists whatever, and would issue no patents, although many years had elapsed since the passage of the act." — "There was no means," it added, "as this court has decided to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant of the State might be defeated by this neglect or refusal of the Secretary to do his duty."

This view of the character of the grant was recognized in *Rice* v. *Sioux City and St. Paul Railroad Company*, decided at the October term, 1883, 110 U. S. 695, 697, 698. The question there was, whether the swamp land act extended to territories upon their subsequent admission as states into the Union. It was held that it did not. Said the court, speaking by the Chief Justice: "That the swamp land act of 1850, operated as a grant *in præsenti* to the States then in existence of all the swamp lands in their respective jurisdictions, is well settled," citing the cases of *Railroad Company* v. *Smith*, 9 Wall. 95; *French* v. *Fyan*, 93 U. S. 169, and *Martin* v. *Marks*, 97 U. S. 345. And again: "The grant under the act of 1850 was to Arkansas and the other states of the Union. Arkansas was an existing state, and the grant was to all the states *in præsenti*. It was to operate upon existing things,

and with reference to an existing state of facts." — "It was to take effect at once between an existing grantor and several separate existing grantees."

The result of these decisions is, that the grant of 1850 is one *in præsenti*, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the State, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the State for any cause other than a consideration of their character.

The legislation of Congress subsequent to the act of 1850, for the purpose of giving it effect, has been in consonance with the view stated of the nature of the grant. It has uniformly recognized the paramount character of the State's title, and has endeavored to correct the evils which in many cases followed from the delay of the Secretary of the Interior in identifying the lands, and furnishing to the State the required lists and plats. The legislatures of the several states in which such lands existed very generally themselves undertook to identify the lands and to dispose of them, and for that purpose passed appropriate legislation for their survey and sale and the issue of patents to the purchasers. Much inconvenience, and in many instances conflicts of title, arose between those claiming under the State and those claiming directly from the United States. To obviate this, on the 2d of March, 1855, Congress passed an act "for the relief of purchasers and locators of swamp and overflowed lands." 10 Stat. 634, c. 147. The act provided that the President of the United States should cause patents to be issued to purchasers and locators who had made entries of the public lands claimed as swamp and overflowed lands with cash or land warrants or scrip, prior to the

issue of patents to states under the act of 1850, "*Provided*, that in all cases where any state through its constituted authorities may have sold or disposed of any tract or tracts of said land to any individual or individuals, prior to the entry, sale or location of the same under the preëmption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land until such state through its constituted authorities shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior."

The act also provided "that upon due proof by the authorized agent of the State or States, before the Commissioner of the General Land Office, that any of the lands purchased were swamp lands within the true intent and meaning of the act aforesaid, the purchase money shall be paid over to said State or States; and when the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount upon any of the public lands subject to entry at one dollar and a quarter per acre, or less, and patents shall issue therefor upon the terms and conditions enumerated in the act aforesaid."

There is here a plain recognition of the prior right of the state to the swamp lands within her limits, by the declaration that no patent of the United States shall be issued to purchasers from them of such lands without a release from the State, and that, in case of completed purchases from them, the purchase money shall be paid to the State, or if the purchase was made by warrant or in scrip, the State may locate an equal quantity of land upon any other public lands subject to entry. By act of March 3, 1857, 11 Stat. 251, c. 117, "to confirm to the several states the swamp and overflowed lands selected under the act of September twenty-eight, eighteen hundred and fifty, and the act of the second March, eighteen hundred and forty-nine," the act of March 2, 1855, was continued in force and extended to all entries and locations of lands claimed as swamp, made since its passage.

The act of Congress of March 12, 1860, 12 Stat. 3, c. 5, extending the provisions of the swamp land act to Minnesota

and Oregon, recognizes in its second section their right and that of other states to make selections of the swamp lands, or rather to provide for their identification, without waiting for the action of the Secretary of the Interior. That section provides that the selection to be made from lands already surveyed in each of the states should be made within two years from the adjournment of the legislature of the state at its next session after the date of the act, and, as to all lands thereafter to be surveyed, within two years from such adjournment at the next session, after notice by the Secretary of the Interior to the governor of the state that the surveys have been completed and confirmed.

By an act passed on the 23d of July, 1866, entitled "An act to quiet land titles in California," 14 Stat. 218, c. 219, Congress changed the provisions of law for the identification of swamp and overflowed lands in that state. It no longer left their identification to the Secretary of the Interior, but provided for such identification by the joint action of the state and Federal authorities.

As early as 1855 the legislature of California undertook to control and dispose of those lands. The Secretary of the Interior had neglected to make out any list and plats of the lands of this character, and to transmit them to the governor of the state, as required by the second section of the act of 1850. The State therefore proceeded, in 1855, to assert her ownership over the lands, by providing for their survey and sale, and the issue of patents to the purchasers. Further legislation was also had on the subject in 1858 and 1859; and, in 1861, an act was passed providing for their reclamation and segregation, making it the duty of the county surveyors to segregate these lands in their respective counties from the high lands, and to make a complete map of the lands in legal subdivisions of sections and parts of sections, and to transmit a duplicate thereof to the surveyor general of the state. Cal. Laws of 1861, 355.

The act of Congress of 23d of July, 1866, was intended to effect the purpose indicated in its title. Previously to its passage there had been great confusion and uncertainty in

relation to land titles in California. This arose with respect to other lands than swamp and overflowed lands, principally from the delay in extending the public surveys of the government, and the action of the state authorities in attempting to select and dispose of the lands granted to her in advance of such surveys. With respect to the swamp and overflowed lands, the confusion had arisen principally from the delay of the Secretary of the Interior in listing such lands to the State, and from inaccuracies of description arising from the want in many parts of the country of the public surveys. The act of July 23, 1866, tended to remove this uncertainty and confusion, principally by recognizing the action of the State in disposing of the lands granted to her, in cases where such disposition was made to parties in good faith, and did not interfere with previously acquired interests, and by providing a mode for identifying the swamp and overflowed lands in the future without the action of the Secretary of the Interior. The first section of the act declared, that in all cases where the State of California had made selections of any portion of the public domain, in part satisfaction of any grant made to her by act of Congress, and had disposed of the same to purchasers in good faith under her laws, the lands so selected should be and were thereby confirmed to the state subject to certain exceptions. This section does not, as supposed by counsel, apply to the swamp and overflowed lands. It was not in satisfaction of a grant of those lands that the State could select lands from any part of the public domain. All she could do was to ascertain where those lands were. She had no power of selection, though that term is sometimes used when merely the power of ascertainment or identification is intended. Secretary Schurz, in *Kile* v. *Tubbs*, July 15, 1879, 6 Copp, 108; Secretary Teller, in *State of California*, December 21, 1883, 2 Decisions of Dep. Int. 643; *Sutton* v. *Fassett*, 51 Cal. 12. It is the fourth section of that act which applies to swamp and overflowed lands. That section, among other things, provides, "That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the

duty of the Commissioner of the General Land Office to certify over to the state of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats. The Commissioner shall direct the United States Surveyor General for the state of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said state; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward [them] to the General Land Office for approval." As thus seen, lands represented as swamp and overflowed on the approved plats of township surveys, made under authority of the United States, were, after that date, to be certified to the State; and lands were to be represented as swamp and overflowed on the township plats which were found on the state segregation maps and surveys of such lands; the approval of the township plats to be made by the Land Office.

Under the act of California of 1861, the surveyor of the county of Yolo, in 1862, segregated the swamp and overflowed lands in that county, and made a map thereof, entitled "Supplemental Segregation of Swamp and Overflowed Land in Yolo County, by Amos Matthews, County Surveyor," on which all the lands in controversy were designated as swamp and overflowed lands, and deposited the same in the state surveyor general's office. A copy of such segregation map, duly certified by the surveyor general of the state, was given in evidence, accompanied with the following certificate of the Surveyor General of the United States:

"U. S. Surveyor General's Office,
San Francisco, California.

"I hereby certify that this diagram has been compared with the original by me, and that the same is a correct transcript of a plat embracing townships eleven north, range two east; twelve north, two east; twelve north, one east

(fractional), and eleven north, one east, Mount Diablo meridian, said plat having been filed in this office between the 22d of March and 4th of April, 1872, and being plat of survey made by the county surveyor of Yolo County, under and in pursuance of the statutes of the state of California then in force, and showing the segregation lines of the swamp and overflowed land in said townships; and further, that the whole of that portion of said plat is designated thereon as swamp and overflowed land; that I have compared the certificate of approval of said plat with the original indorsed thereon, and that the same is a full, true and correct transcript thereof.

"Witness my hand and the seal of this office this 22d day of September, A.D. 1873.

"[SEAL.] J. R. HARDENBURGH,

U. S. Surveyor General California."

Objection was taken to a copy of this map, because the one deposited in the office of the surveyor general of the state was not marked as filed. If such was the case, the omission was one of that officer, and could not affect the validity of the map as evidence. It was in proof that the county surveyor deposited the map in that office, and that ever since it had remained there. No other segregation map was ever in the office.

On the first of July, 1861, the swamp and overflowed lands in the county, in controversy in this case, and designated as such on this map, subsequently made, were purchased by different parties from the State, as shown by certificates of purchase issued to them bearing that date, which were produced in evidence. These certificates were assigned to the plaintiff. They are made by statute *prima facie* evidence of legal title in the holders thereof; and upon them ejectment can be maintained for the land described. Act of April 13, 1859; *Richter* v. *Riley*, 22 Cal. 639.

On the 10th of January, 1866, a plat or map of the township, in which the lands in controversy are situated, was

approved by L. Upson, United States surveyor general for California, on which map only one parcel of the lands was designated as swamp and overflowed land. The map showed on its face that the survey of the township was made in the field, in 1864. On the 4th of April, 1872, J. R. Hardenburgh, United States surveyor general for California, who had succeeded Mr. Upson, compared this map with the segregation map of swamp and overflowed lands in the township, made by the surveyor of the county under the laws of the state, which conform to the system of surveys adopted by the United States, and amended the township plat in accordance with the segregation, and forwarded the same to the General Land Office, where it was officially used as an approved plat. Upon this amended map all the lands in controversy are designated as swamp and overflowed. The following letter of the surveyor general accompanied the map:

"U. S. SURVEYOR GENERAL'S OFFICE,
SAN FRANCISCO, *April* 19, 1872.

"Hon. WILLIS DRUMMOND,

Commissioner General Land Office, Washington, D. C.

"SIR: I transmit in a separate roll by to-day's mail certified plats, also certified descriptive lists, of the following townships, showing all tracts which the state of California claimed as swamp and overflowed prior to July 23, 1866; also showing the segregation of swamp and overflowed lands made by the United States, viz.: Township eleven north, range one east; township eleven north, range two east; township twelve north, range two east, Mount Diablo meridian. The lists of said tracts contain annotations in red ink made by the register of the U. S. Land Office at Marysville, stating all titles to said lands adverse to the claims of the state of California, together with the Register's certificate testifying to the correctness of such annotations, as appears from the records of this office.

"These plats and lists are sent you in accordance with the instructions contained in your letter of July 7, 1871, which in-

closed for my guidance a copy of a letter addressed to L. Upson, U. S. Surveyor General, dated Sept. 13, 1866.

"Very respectfully, your obedient servant,

"J. R. HARDENBURGH,

U. S. Surveyor General for California."

The Commissioner, Mr. Williamson, who succeeded Mr. Drummond in office, certifies, under date of January 12, 1878, to a copy of this plat of township eleven north, range two east, of Mount Diablo meridian, as one received with the Surveyor General's letter of April 19, 1872, and "since which time it has been officially used as approved plat made in accordance with § 2488, U. S. Revised Statutes." This section declares that "it shall be the duty of the Commissioner of the General Land Office to certify over to the state of California, as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States." Subsequently, in July, 1877, the state surveyor general forwarded to the Commissioner of the Land Office certified copies of certain swamp land surveys, with a statement that the lands described in them were all sold by the State in good faith as swamp and overflowed lands prior to July 23, 1866, and requested that the lands not already listed, which included those in controversy, be certified to the State. The Commissioner replied that the lands in the township had all been disposed of, and patents issued to settlers under the laws of the United States, and upon that ground alone he refused the application. This refusal was approved by Mr. Schurz, Secretary of the Interior, the latter observing, in justification of it, that it had been decided by the Supreme Court of the United States that a patent, when issued and delivered to and accepted by the grantee, passed the legal title to the land, and all control of the executive department over it ceased. "If any lawful reason exists," said the Secretary in his communication to the Commissioner, "why the patent should be cancelled or annulled, such as fraud on the part of the

grantee, or mistake or misconstruction of the law on the part of your office, the appropriate remedy is by a bill in chancery, and an action may be maintained by the United States, or any contesting claimant, but you are not authorized to reconsider the facts on which a patent was issued, and to recall or rescind it, or to issue one to another party for the same tract," citing *United States* v. *Hughes*, 11 How. 552; *United States* v. *Stone*, 2 Wall. 525; *Hughes* v. *United States*, 4 Wall. 232; and *Moore* v. *Robbins*, 96 U. S. 530. There was no suggestion by either the Commissioner or the Secretary that the lands were not swamp and overflowed as designated upon the township plat.

The question, therefore, is whether upon the proof thus presented of the segregation of the lands in controversy as swamp and overflowed lands by the authorities of the state of California, and their designation as such lands on a plat of the township made by the Surveyor General of the United States, and approved by him, and forwarded to the General Land Office, pursuant to the fourth section of the act of 1866, and approved by the Commissioner, as shown by its official use, the plaintiff can maintain an action for the recovery of the lands, they never having been certified over to the State, as required by § 2488 of the Revised Statutes, or patented to her under the act of 1850. According to the decisions we have cited, the holders of the certificates of purchase had a good title to the lands if in fact they were swamp and overflowed lands on the 28th of September, 1850.

The certificates were conclusive as evidence against the State that they were such lands. The statute of California, as already stated, makes them *prima facie* evidence of legal title to the premises in the holders, and upon them ejectment can be maintained in the state courts. The case of the plaintiff was therefore *prima facie* established by the production of the certificates, and showing their assignment to him. *Richter* v. *Riley*, 22 Cal. 639, cited above.

The representation of the lands as swamp and overflowed on the approved township plat would be conclusive as against the United States that they were such lands, if they had not

been patented before the return of such township plat to the Land Office. The act of Congress intended that the segregation maps prepared by authority of the State, and filed in the state surveyor general's office, if found upon examination by the United States Surveyor General to be made in accordance with the public surveys of the General Government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact, except where this would interfere with previously acquired interests. In this case the defendants trace title by patents of the United States purporting to be issued to settlers under the preëmption laws, in 1866, 1867, 1868, and 1871, upon declaratory statements made in 1864, three years after the purchase from the State by the grantors of the plaintiff, and two years after a map segregating these lands had been made by the surveyor of the county, pursuant to the law of the state, and deposited in the surveyor general's office. These patents were evidence that whatever title the United States then held passed to the patentees, and as against a mere intruder without claim of title from a paramount source, were conclusive that the lands were of the character which by the patents they were represented to be. This was the case of *Ehrhardt* v. *Hogaboom*, 115 U. S. 67. There the plaintiff claimed by a patent issued to his grantor under the preëmption laws. The defendant admitted he was in possession of twenty acres, and contended that these were swamp and overflowed lands which passed to the State under the act of 1850. It appeared, however, that the certificate of purchase, which he produced, did not embrace the lands in controversy, and his offer to prove the character of the land as swamp and overflowed by parol was rejected. The court said: "He was, as to the twenty acres, a simple intruder without claim or color of title. He was, therefore, in no position to call in question the validity of the patent of the United States for those acres, and require the plaintiff to vindicate the action of the officers of the Land Department in issuing it." And again: "It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under

the preëmption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title." But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior conveyance from a common source. The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceedings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity. As we said in *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641: "When we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

And again, in the same case, we said, p. 646: "A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or

had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

"There are cases," said Chief Justice Marshall, "in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." *Polk* v. *Wendall*, 9 Cranch, 87, 99. Indeed, it may be said to be common knowledge that patents of the United States for lands which they had previously granted, reserved for sale, or appropriated, are void. *Easton* v. *Salisbury*, 21 How. 426; *Reichart* v. *Felps*, 6 Wall. 160; *Best* v. *Polk*, 18 Wall. 112. It would be a most extraordinary doctrine if the holder of a conveyance of land from a state were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, and especially from showing that years before, they had granted the property to the state, and thus were without title at the time of their subsequent conveyance. As this court said in *New Orleans* v. *United States*, 10 Pet. 662, 731: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative."

The court below held, and placed its decision upon the ground, that, because the Commissioner of the General Land Office had not certified the lands in controversy to the State as swamp and overflowed, when this action was commenced in 1870, there was no title in the state by the grant of 1850 which could be enforced, thus making the investiture of title depend upon the act of the Commissioner instead of the act of Congress; whereas the certificate of that officer, when the

previous requirements of the law have been complied with, is only an official recognition that the lands are of the character designated, and of the completeness of their segregation. The decision is in conflict with its previous decisions, and with the adjudged cases to which our attention has been called.

In *Sacramento Valley Reclamation Company* v. *Cook*, 61 Cal. 341, decided as late as 1882, that court recognized the swamp land grant of 1850 as one *in præsenti*. Its language was: "It is as well settled as anything can be by the courts that the donation of swamp and overflowed lands by the United States to the states in which such lands were situated at the date of the passage of the act of September 28, 1850, 'was a grant *in præsenti*, by which the title to those lands passed at once to the states in which they lay, except as to states admitted into the Union after its passage,'" citing *French* v. *Fyan*, 93 U. S. 169.

For the error in holding that the certificate of the Commissioner was necessary to pass the title of the demanded premises to the State, the case must go back for a new trial, when the parties will be at liberty to show whether or not the lands in controversy were in fact swamp and overflowed on the day that the swamp land act of 1850 took effect. If they are proved to have been such lands at that date, they were not afterwards subject to preëmption by settlers. They were not afterwards public lands at the disposal of the United States. Parties settling upon such lands must be deemed to have done so with notice of the title of the State, and after the segregation map was deposited with the surveyor general of the state, with notice also that they were actually segregated and claimed by the State as such lands.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

ROBINSON *v.* ANDERSON.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Submitted April 18, 1887. — Decided May 2, 1887.

When, after all the pleadings are filed in a cause in a Circuit Court of the United States between citizens of the same state, it appears that the averments in the declaration which alone gave the court jurisdiction are immaterial in the determination of the matter in dispute, and are made for the purpose of creating a case cognizable by the court, it is the duty of the Circuit Court to dismiss the bill for want of jurisdiction.

THE plaintiff in error, who was plaintiff below, a citizen of California, brought suit against other citizens of the same state, to recover possession of lands in Los Angeles County, California, alleging that the action arose "under the laws of the United States and the treaty known as the treaty of Guadelupe-Hidalgo." After answers were filed the case was dismissed for want of jurisdiction. The plaintiff sued out this writ of error to review that judgment. The case is stated in the opinion of the court.

Mr. L. D. Latimer for plaintiff in error.

No appearance for defendant in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is a writ of error sued out under § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, for the review of an order of the Circuit Court dismissing a suit brought by Robinson, a citizen of California, against other citizens of the same state, for want of jurisdiction. The claim on the part of the plaintiff in error is, that upon the face of the complaint it appears that the suit is one arising under the Constitution, or laws, or treaties of the United States, and that consequently the Circuit Court had jurisdiction by reason of the subject matter of the

action; but on examination we find that, according to the plaintiff's own showing in his complaint, his rights all depend on the boundaries of the Rancho Los Bolsas, granted by the Mexican government to Manuel Nieto, and confirmed and patented to his representatives by the United States under the act of March 3, 1851, c. 41, 9 Stat. 631, "to ascertain and settle the private land claims in the state of California." Primarily these boundaries depend on the description of the land granted as found in the patent issued under the decree of confirmation, and it nowhere appears that either the Constitution or any law or treaty of the United States is involved in this.

It is true that in the complaint the plaintiff alleges that the several defendants claim to be owners of parts of the Rancho Santiago de Santa Ana, adjoining the Rancho Los Bolsas on the east, granted by the Mexican government to Antonio Yorba in 1810, and confirmed and patented by the United States to Bernard Yorba and others in 1855, and that, if the ranchos overlap, the title of the defendants is the best, because the grant of the Rancho Santiago de Santa Ana is the oldest and has precedence. He also alleges that the defendants claim "that they are 'third persons' as to whom the patents of Los Bolsas are not conclusive under the act of" 1851, just referred to, and there are also some allegations as to the authority of the Commissioner of the General Land Office, under the laws of the United States, to order a resurvey of the Rancho Santiago de Santa Ana, which had been once surveyed so as to exclude the premises in dispute. Many of the defendants answered, denying that they were in possession of any portion of the premises in dispute, and others claiming that they were in possession "by and with the consent of plaintiff made and given to defendants by plaintiff's agent, R. J. Northam, on or about the — day of June, 1882, and not otherwise." Others claim to be in possession "in severalty under and by virtue of written contracts for the conveyance of said several tracts of land . . . by the said plaintiff to said defendants." None of the defendants in their answers claim title under the grant of the Rancho Santiago de Santa Ana.

Upon the pleadings the court dismissed the suit, evidently

for the reason that it did not "really and substantially involve a dispute or controversy within the jurisdiction" of that court. Such was the clear duty of the court under the act of 1875, unless from the questions presented by the pleadings it distinctly appeared that some right, title, privilege, or immunity, on which the recovery depended, would be defeated by one construction of the Constitution or some law or treaty of the United States, or sustained by an opposite construction. *Starin* v. *New York*, 115 U. S. 248, 257.

Even if the complaint, standing by itself, made out a case of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on. The Circuit Court cannot be required to keep jurisdiction of a suit simply because the averments in a complaint or declaration make a case arising under the Constitution, laws, or treaties of the United States, if, when the pleadings are all in, it appears that these averments are immaterial in the determination of the matter really in dispute between the parties, and especially if, as here, they were evidently made "for the purpose of creating a case" cognizable by the Circuit Court, when none in fact existed. The provision in § 5 of the act of 1875, requiring the Circuit Court to proceed no further, and dismiss the suit when it satisfactorily appears that, "such suit does not really and substantially involve a dispute or controversy properly within" its jurisdiction, applies directly to this case as it stands on the pleadings. The answers show that the case made by the complaint was fictitious and not real. The defendants either disclaim all interest in the land, or claim title under and not adverse to that of the plaintiff.

The order dismissing the case is affirmed.

WILSON'S EXECUTOR *v.* DEEN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued April 5, 6, 1887. — Decided April 25, 1887.

A judgment rendered on the merits in an action in a court of record is a bar to a second suit between the same parties on the same cause of action; and when the second suit involves other matter as well as the matters in issue in the former action, the former judgment operates as an estoppel as to those things which were in issue there, and upon the determination of which the first verdict was rendered.

Extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible at the trial of an action to show that a former action in a court of record between the same parties, in which judgment was rendered on the merits, involved matters in issue in the suit on trial, and were necessarily determined by the first verdict.

On the 29th of October, 1873, Ann Maria Deen, the plaintiff in the court below, leased to one Mary C. C. Perry, of New York, by an instrument under seal, the house known as No. 4 East Thirtieth Street of that city, with the furniture therein, for the term of two years and ten months from the first day of November, 1873, at the rent of $450 a month, payable in advance, with a clause of reëntry in case of default in the payment of the rent, or in any of the covenants of the lease.

At the same time, and upon the same paper, the defendant, William M. Wilson, of New York, in consideration of the letting of the premises to the lessee, and of the sum of one dollar paid to him by the lessor, by an instrument under seal, covenanted and agreed with her, that if default should be made at any time by the lessee in the payment of the rent, and performance of the covenants contained in the lease, he would pay the rent, or any arrears thereof, and all damages arising from the non-performance of the covenants.

No rent was paid by the lessee except for the first month, and soon after December, 1873, she ceased to occupy the house, and abandoned it. In March, 1874, the lessor gave

notice to her that, as she had abandoned the house, and there was danger of the furniture being injured, possession would be taken and the premises rented for the remainder of the term; and that the lessor would look to her for any deficiency in the rent and for the expenses of reletting, as well as for all damages that might be sustained by reason of the loss of or injury to the furniture

In April, 1874, the lessor took possession of the premises, and in November following leased the house, without the furniture, to one Sherman, for two years and five months from December 1, 1874, at $3600 a year, payable in half-yearly payments, in advance.

For the deficiency of the rent on the original lease, after deducting the amount collected from the new tenant, the present action was brought against the defendant as guarantor for the rent.

To the complaint setting forth the lease, the covenant of guaranty, the new lease, and the deficiency claimed to be due upon the lease, the defendant answered, denying, among other things, the allegations of abandonment of the premises by the lessee, of notice to her of the intention of the lessor to resume possession, and of the amount due; and for a separate defence alleged that in December, 1873, the plaintiff brought an action in the Marine Court of the city of New York against the defendant for the rent of the same premises for that month, and that the defendant recovered judgment therein against the plaintiff in the action, upon the merits thereof, and for costs.

On the trial, to meet the case established by the plaintiff, the defendant among other things, gave in evidence the judgment book of the Marine Court, showing a judgment, entered on the 12th of March, 1874, in favor of the defendant William M. Wilson against the plaintiff Ann Maria Deen, for $55.91 costs; and also the judgment roll in the action containing the summons and complaint, the answer, minutes of the verdict for the defendant, and the judgment in his favor. The complaint was upon the same lease as that upon which this action is brought, and was for rent for the month beginning on the first day of December, 1873. The answer, treating the lease

and the covenant upon it as one instrument, set up that "on or about the 29th day of October, 1873, the plaintiff, by false and fraudulent statements, obtained the signature of Mary C. C. Perry and of this defendant to a paper purporting to be a lease of the premises described in the complaint; that the said Mary C. C. Perry and this defendant were both misled by the false representations; and that the said Mary C. C. Perry and this defendant were induced by their belief in the truth of such representations to sign the said paper." It was admitted of record by counsel for the plaintiff that "the only issue tried" in that action in the Marine Court "was that of fraud in procuring the lease," and that there was no issue as to the payment of the rent or as to the delivery of the lease.

When the evidence was closed, and the parties had rested, the defendant moved that the complaint be dismissed, on the ground that the judgment in the Marine Court was a bar to the action; but the court denied the motion, and the defendant excepted. Afterwards the court directed the jury to find a verdict for the plaintiff for $12,026.89, the full amount claimed, less the rent for the month of December, 1873, which they accordingly did. To this direction an exception was taken.

Mr. Edward C. Perkins and *Mr. John C. Gray* for plaintiff in error cited: *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Beloit* v. *Morgan*, 7 Wall. 619; *Gardner* v. *Buckbee*, 3 Cowen, 120;[1] *Bouchaud* v. *Diaz*, 3 Denio, 238; *Duchess of Kingston's Case*, 20 How. St. Tr. 538; *Packet Co.* v. *Sickles*, 5 Wall. 580; *People* v. *Stephens*, 51 How. Pr. 235; *Griffin* v. *Long Island Railroad*, 102 N. Y. 449; *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137; *Pray* v. *Hegeman*, 98 N. Y. 351; *Lorillard* v. *Clyde*, 99 N. Y. 196, 201; *Day* v. *Watson*, 8 Mich. 535; *Rice* v. *Dudley*, 65 Ala. 68; *Hall* v. *Gould*, 13 N. Y. 127; *Bain* v. *Clark*, 10 Johns. 424; *Colburn* v. *Morrill*, 117 Mass. 262; *Christopher* v. *Austin*, 11 N. Y. 216; *Stuyvesant* v. *Davis*, 9 Paige, 427; *Jones* v. *Carter*, 15 M. & W. 718; *Combe* v. *Woolf*, 1 Moore & Scott, 241; *Liquidators of Overend & Co.* v. *Liquidators of Oriental Corporation*, L. R. 7 H. L. 348,

[1] *S. C.* 15 Am. Dec. 256.

361; *Horne* v. *Bodwell*, 5 Gray, 457; *Greely* v. *Dow*, 2 Met. (Mass.) 176; *Rees* v. *Berrington*, 2 Ves. Jun. 540; *Samuell* v. *Howarth*, 3 Meriv. 273; *Gahn* v. *Niemcewicz*, 11 Wend. 312; *Amory* v. *Kannoffsky*, 117 Mass. 351; *Hanham* v. *Sherman*, 114 Mass. 19, 23; *Davison* v. *Gent*, 1 H. & N. 744; *Thomas* v. *Cook*, 2 B. & Ald. 119; *Nickells* v. *Atherstone*, 10 Q. B. (N. S.) 944; *Bacon* v. *Chesney*, 1 Stark, 192; *Leeds* v. *Dunn*, 10 N. Y. 469, 477; *Bonar* v. *Macdonald*, 3 H. L. C. 226; *Glyn* v. *Hertel*, 8 Taunt. 208; *Philips* v. *Astling*, 2 Taunt. 206; *Smith* v. *United States*, 2 Wall. 219, 237, *McMicken* v. *Webb*, 6 How. 292, 298.

Mr. Joseph A. Shoudy for defendant in error. *Mr. Henry T. Wing* was with him on the brief.

I. The answer does *not* contain a denial of the abandonment of the premises by Mrs. Perry, the tenant. The only denial is the concluding paragraph, "of each and every other allegation of the complaint contained not hereinbefore admitted." Such a denial has been repeatedly held to raise no issue. *McEncroe* v. *Decker*, 58 How. Pr. 250; *People* v. *Snyder*, 41 N. Y. 397, 400; *People* v. *Northern Railroad Co.*, 53 Barb. 98.

II. The learned circuit judge correctly held that if the judgment in the Marine Court was to be regarded as in full force, it was not a bar under the issues in this case, except as to the rent for the month of December, 1873, which was the subject matter of the controversy in that action. His opinion contains a clear statement of the law applicable to the case, as it has been adjudged by this court, as well as by the highest court of the state of New York. The distinction is there clearly pointed out between a suit brought to recover the same identical demand which has been the subject of litigation in a former action, and another demand of the same nature. This cannot be better stated than by the learned judge below; and his views seem to be fully sustained by the two cases in 94 U. S. there referred to. *Cromwell* v. *Sac*, p. 351; *Davis* v. *Brown*, p. 423. The same view is adopted and

enforced by the Court of Appeals of the state of New York in *Marsh* v. *Masterton*, 101 N. Y. 401. The gist of that decision, as stated in the head note, is: "That a judgment in a former suit between the same parties is a bar to a subsequent action only when the *point* or *question in issue is the same in both*."

In the suit in the Marine Court it was distinctly asserted that the lease never was delivered, and that possession was never taken thereunder. As to this defence, the Court of Appeals held that proof of contemporaneous or preceding oral stipulations not embraced in the lease was not admissible either in law or in equity to affect the covenants or agreements therein contained. *Wilson* v. *Deen*, 74 N. Y. 531.

III. The judgment of the Marine Court was not pleaded in bar to the cause of action alleged in the complaint. The answer in that respect is fatally defective. It is no answer to this point to say that the proof supplied the defect, even if it were true, as we submit that it was not. The defence must be alleged as well as proved. "Facts proved but not pleaded are not available to the party proving them." *Field* v. *Mayor of New York*, 6 N. Y. 179.[1] See also *Piatt* v. *Vattier*, 9 Pet. 405; *Harrison* v. *Nixon*, 9 Pet. 483. It is for the plaintiff in error to point out distinct and positive error. Otherwise the judgment below will not be disturbed. Every inference and intendment will be in support of the judgment. *Ventress* v. *Smith*, 10 Pet. 161; *Coffee* v. *Planters' Bank*, 13 How. 183, 186.

IV. The judgment in the Marine Court of the state of New York, although existing upon the record, had in fact been done away with by the acts and agreement of the party. There was a substantial agreement as to there having been an oral consent to do away with the proceedings in the Marine Court. We submit, that this oral consent, having been made in open court and the substance of it entered upon the minutes of the court, was as effectual as if it had been in writing. An oral consent made in open court, although it has reference to proceedings in another cause, will be enforced. *Jewett* v. *City of Albany*, Clarke Ch. 241; *Phillips* v. *Wicks*, 38 N. Y. Super. Ct.

[1] *S. C.* 57 Am. Dec. 435.

74. Such a consent, made in the progress of the trial, constitutes a valid and irrevocable agreement. Causes are tried every day and the most important matters finally determined on such consent. This judgment having been once done away with was forever abrogated. The plaintiff in error was thereafter estopped from making use of it. He received full consideration for the agreement in being permitted to proceed with the trial of his cause and obtain, as he did then, an adjudication of the court as to the validity of the lease.

V. The judgment in the Marine Court has been wholly annulled and vacated since the trial of this action by the judgment of the Supreme Court of the state of New York, which has been carried into effect in the Marine Court by the actual cancellation of the record there. The defendant in error now offers exemplified copies of the records in those courts, proving conclusively the facts here stated. This court will not reverse the judgment by reason of any error which may have been committed in regard to the effect of that judgment, which has now been done away, and would be no obstacle to a recovery on a new trial. The case of *Pugh* v. *McCormick*, 14 Wall. 361, is in point. This court is not inclined to reverse a judgment, unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial, and that the same party will be entitled to judgment if a new trial is granted. *Id.*, page 374. Records will be received in an appellate court for the purpose of upholding a judgment, though not for the purpose of reversing it. *Bank of Charlestown* v. *Emeric*, 2 Sandf. (N. Y.) 718; *Jarvis* v. *Sewall*, 40 Barb. 449, 455; *Rockwell* v. *Merwin*, 45 N. Y. 166; *Stilwell* v. *Carpenter*, 62 N. Y. 639; *Wines* v. *The Mayor*, 70 N. Y. 613; *Dakota* v. *Glidden*, 113 U. S. 222.

VI. The defendant in error had a clear legal right to take possession of the abandoned premises for their preservation, and for the purpose of rendering the injury to her as light as possible, and for the same purpose to let them for the account of the tenant without, in any manner, imparing her obligations under the lease against the surety. It is a well estab-

lished principle of law that when a person is liable to be injured by the breach of covenant or wrongful act of another he is bound to take *active measures* to render the injury as light as possible. This is a principle believed to be of universal application. *Hamilton* v. *MacPherson*, 28 N. Y. 72; *Heckscher* v. *McCrea*, 24 Wend. 304; *Clark* v. *Marsiglia*, 1 Denio, 317;[1] *Dillon* v. *Anderson*, 43 N. Y. 231; *Howard* v. *Daly*, 61 N. Y. 362; *Polk* v. *Daly*, 14 Abb. Pr. (N. S.) 156; *Warren* v. *Stoddart*, 105 U. S. 224.

This principle prevails in admiralty. When the charterer of a vessel fails to supply cargo, or refuses to perform the charter party, it is the duty of the owner to secure another freight or a new charter with as little delay as possible. *Baetjer* v. *Börs*, 7 Ben. 280; *Ashburner* v. *Balchen*, 7 N. Y. 262; *Duffie* v. *Hayes*, 15 Johns. 327; *Heckscher* v. *McCrea*, 24 Wend. 304. There is no good reason why this rule should not apply to demises of real estate as well as to other contract obligations.

VII. In order to effect a termination of the relation of landlord and tenant, there must be a surrender and acceptance either by act of the parties or operation of the law. *Beall* v. *White*, 94 U. S. 382, 389. There must not only be a surrender, but an acceptance as well, and in order to constitute an acceptance, the intention of the lessor is material. If the tenant abandons and the landlord relets the premises, giving the tenant notice that he does it for and on his (the tenant's) account, the surrender is not established. *Peter* v. *Kendal*, 6 B. & C. 703; *Walls* v. *Atcheson*, 3 Bing. 462; *Auer* v. *Penn*, 99 Penn. St. 370; *Bloomer* v. *Merrill*, 1 Daly (N. Y.) 485; *Meyer* v. *Smith*, 33 Ark. 627.

VIII. There is no ground for the claim on behalf of the plaintiff in error, that the notice to the tenant and her tacit assent thereto, worked a change of the contract, releasing the surety. *Morgan* v. *Smith*, 70 N. Y. 537, is in point, and on this point cannot be distinguished from the present case.

Mr. Justice Field, after stating the case, delivered the opinion of the court.

[1] *S. C.* 43 Am. Dec. 670.

The conclusion we have reached as to the effect of the judgment of the Marine Court renders it unnecessary to pass upon, or even to state the other questions raised in the progress of the trial. There is nothing in the record tending to impair the force of that judgment. Notice of appeal from it to the general term of the court was given, but it does not appear that the appeal was ever prosecuted. The alleged parol stipulation by counsel, that the judgment might be vacated, is not admitted; but, if made, it is not shown to have been acted upon by any entry on the records of the Marine Court. The proceedings in the suit in the Supreme Court to cancel the lease and the ruling of the Court of Appeals therein, that evidence of cotemporaneous or preceding oral stipulations could not be received to control the lease, have no bearing upon the question before us, and the proceedings in the suit are still pending. As the case stands before us, the judgment of the Marine Court is in no respect impaired, and the defendant can invoke in his behalf whatever it concluded between the parties. The validity of the lease in suit here was involved there. The answer there alleged that, by false and fraudulent representations, the signature of the lessee was obtained to the lease, and that both she and the defendant Wilson were misled by those representations to sign the paper. The parties admitted that the only issue in that action was "that of fraud in procuring the lease." That issue being found by the verdict of the jury in favor of the defendant, the judgment thereon stands as an adjudication between the parties by a court of competent jurisdiction, that the lease was obtained upon false and fraudulent representations of the plaintiff, and, therefore, was of no obligatory force. It determined not merely for that case, but for all cases between the same parties, not only that there was nothing due for the rent claimed for the month of December, 1873, but that the lease itself was procured by fraud, and therefore void.

In *Cromwell* v. *County of Sac*, 94 U. S. 351, we considered at much length the operation of a judgment as a bar against the prosecution of a second action upon the same demand,

and as an estoppel upon the question litigated and determined in another action between the same parties upon a different demand, and we held, following in this respect a long series of decisions, that in the former case the judgment, if rendered upon the merits, is an absolute bar to a subsequent action, a finality to the demand in controversy, concluding parties and those in privity with them; and that in the latter case, that is, where the second action between the same parties is upon a different demand, the judgment in the first action operates as an estoppel as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. Of the application of this rule *Gardner* v. *Buckbee*, 3 Cowen, 120,[1] furnishes an illustration. There it appeared that two notes had been given upon the sale of a vessel. On examination the vessel proved to be unseaworthy, and the maker of the notes refused to pay them on the ground of fraudulent representations by the vendor. Thereupon an action was brought by the holder upon one of the notes in the Marine Court of the city of New York. The defendant pleaded the general issue, with notice of a total failure of consideration for the notes, on the ground of fraud in the sale of the vessel, and upon that point judgment was rendered in his favor. The holder thereupon brought an action upon the other note in the Court of Common Pleas of the city of New York, and at the trial the defendant offered in evidence in bar of the action the record of the judgment in the Marine Court, the defence being fraud in the sale of the vessel, and the judgment having been rendered directly upon that issue between the same parties. The Court of Common Pleas decided that the judgment was not a bar, but the Supreme Court of the state reversed the decision, declaring the law to be well settled that a judgment of a court of concurrent jurisdiction directly upon the point is, as a plea or evidence, conclusive between the same parties upon the same matter directly in question in another court, referring to and following the rule laid down by Chief Justice De Grey in the celebrated case of the Duchess of Kingston. It was urged that the judgment in

[1] *S. C.* 15 Am. Dec. 256.

the Marine Court did not affirm any particular fact in issue in the Common Pleas, but was general and indefinite, and that, from the language of the record, it could not be inferred whether the two cases were founded upon the same or a different state of facts; but the court answered that it was true the record merely showed the pleadings and that judgment was rendered for the defendant, but it showed that it was competent on the trial to establish the fraud of the plaintiff; and whether fraud was the point upon which the decision was founded could be proved by extrinsic evidence; and that the admission of such evidence was not inconsistent with the record and did not impugn its verity.

This decision has been frequently cited with approval by this court and the courts of every state. It is everywhere recognized as correctly applying the law as settled in the Duchess of Kingston's case. It is not possible to distinguish it from the one before us. Fraud in procuring the lease, upon which this action is brought, was the point in issue in the action in the Marine Court between the same parties, and it having been found by the verdict of the jury against the plaintiff, and judgment having been rendered upon that finding, the fact thus established must necessarily defeat any subsequent action upon the same instrument between those parties. The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether the decision was right or wrong. *Packet Co.* v. *Sickles*, 5 Wall. 580; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Tioga Railroad* v. *Blossburg & Corning Railroad*, 20 Wall. 137; *Pray* v. *Hegeman*, 98 N. Y. 351; *Merriam* v. *Whittemore*, 5 Gray, 316.

It is stated in the brief of counsel, and it was repeated on the argument, that the judgment of the Marine Court has been vacated by the Supreme Court of the state since this case was tried, in an action brought for that purpose. If such be the fact, it cannot be made available in this court to obviate an erroneous ruling at the trial.

Statement of Facts.

During the pendency of the case in this court the defendant below, plaintiff in error here, has died, and the executor of his estate has been substituted as a party in his place.

Judgment of the court below reversed, and cause remanded with direction to award a new trial.

STANLEY *v.* SUPERVISORS OF ALBANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Argued March 15, 16, 1887. — Decided May 2, 1887.

When the case below is tried by a court without a jury, its findings upon questions of fact are conclusive; and this court can consider only its rulings on matters of law properly presented in a bill of exceptions, and the further question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered.

When the statutes of a state provide a board for the correction of errors and irregularities of assessors in the assessment of property for purposes of taxation, the official action of that body is judicial in character, and its judgments are not open to attack collaterally.

A party who feels himself aggrieved by overvaluation of his property for purposes of taxation, and does not resort to the tribunal created by the state for correction of errors in assessments before levy of the tax, cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation.

This case has once been before this court, and is reported at 105 U. S. 305, to which reference is made for the facts up to that time. Subsequent to that decision, the plaintiff Stanley was permitted to amend his complaint. The ground of the relief sought for, as stated in each count of the amended complaint, except the fourth, was as follows:

"And plaintiff says, upon information and belief, that the said pretended assessment was illegal and void. That under the Constitution and laws of the United States said shares of stock were not liable to assessment and taxation by state authority, except so far as permission to make such assessment was given by § 5219 of the Revised Statutes of the United

States, which provides that nothing therein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which the association is located; but that the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association, owned by non-residents of any state, shall be taxed in the city or town where the bank is located and not elsewhere.

"And plaintiff further says, upon information and belief, that the said assessors did intentionally, by a rule prescribed by themselves, assess or assume to assess the said shares of stock in said National Albany Exchange Bank at a greater rate in proportion to their actual value than other moneyed capital generally, in the hands of individual citizens of the state of New York. That the rule adopted by said assessors was to assess all shares of stock in state and national banks in said city at par, irrespective of their actual or market value, making the requisite deduction for real estate owned by said banks. That such rule necessarily resulted in imposing upon the shares of said National Albany Exchange Bank a greater rate of taxation than was assessed upon other moneyed capital generally. That there were in said sixth ward, of said city, at the time of said assessments, several banks, state and national, and that the actual value of the stock of said banks varied, that of the shares of stock in the said National Albany Exchange Bank being considerably less than the stock of most of the other banks in the said city.

"That there was a large amount of moneyed capital in said city of Albany and in said sixth ward, in the year aforesaid, in the hands of individual citizens of the state of New York, and that such moneyed capital was generally assessed at a less rate than the said shares of stock in said National Albany

Argument for Plaintiff in Error.

Exchange Bank. That the rule adopted as aforesaid by said board of assessors was not authorized by the laws of the state of New York, and was in violation of the provisions of § 5219 of the Revised Statutes of the United States; and that, for the reasons above set forth, the said pretended assessment was illegal and void, and the money thereby collected was wrongfully collected and paid into the county treasury, and belongs of right to the said Chauncey P. Williams and not to said county."

After this amendment was made, but before the trial, the plaintiff in error discontinued the action as to the 5th, 6th, 7th, 10th, 11th and 12th counts, as to which the statute of limitations had not run, and the case was retried before the court, without a jury, a jury trial having been waived by the parties, upon the counts remaining in the complaint, viz., 1st, 2d, 3d, 4th, 8th, 9th. Judgment for defendant, excepting as to the fourth count.

Judgment for plaintiff on the fourth count. 15 Fed. Rep. 483. This was the count to recover the taxes collected on the shares of one of the shareholders, viz., Chauncey P. Williams, who had made proof before the assessors that he owed debts exceeding the amount of his assessment, which question had been presented and disposed of by the previous determination of this court. 105 U. S. 316.

Mr. Matthew Hale for plaintiff in error.

I. The court below erred in holding and deciding that the plaintiff had failed to establish the allegations in the complaint, that the assessments were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state; and also in refusing to find, as requested by the plaintiff, that the rule adopted and acted upon by the assessors of assessing all bank stock at its par or nominal value, irrespective of its actual value, necessarily resulted in assessing shares of stock in the National Albany Exchange Bank at a greater rate in proportion to their actual value than other moneyed capital, and was, therefore, a violation of the restriction contained in § 5219 of the Revised Statutes.

Argument for Plaintiff in Error.

The law applicable to this case, as laid down by this court when it was here before, is as follows: "But if it is intended to allege that, apart from the question of the right of the shareholder to deduct for his debts — a question which, in this case, *was disposed of* and was in issue — it can be proved that the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher in proportion to their actual value than other moneyed capital generally, then there is ground for recovery, and a hearing as to that should be granted." 105 U. S. 318.

This was the same doctrine laid down by this court in the Ohio cases, namely, that the systematic and intentional valuation of other moneyed capital by the taxing officers below its value, while the shares in question are assessed at their full value, or at a greater rate, is a violation of the act of Congress which prescribes the rule by which they shall be taxed by state authority. *Pelton* v. *National Bank*, 101 U. S. 143; *Cummings* v. *National Bank*, 101 U. S. 153. It may be correctly stated in different language as follows: Where the habitual and intentional action of local assessors in assessing the shares of a national bank is in violation of the restrictions imposed by the laws of the United States, it is none the less illegal and void because it also violates a state law. There can be no question that the shares of the national bank in question were assessed at a greater rate than "other moneyed capital." This unequal assessment was habitual and intentional on the part of the assessors and by a rule prescribed by themselves. This is shown by clear and uncontradicted evidence.

This course of action was taken by the assessors notwithstanding the protest of the shareholders in the Exchange Bank and has been repeatedly condemned by the courts of the state of New York. In the *certiorari* proceeding, the Supreme Court of the state of New York say: The assessments have not been made against the shareholders "on the *value* of their shares of stock" as the law requires, but were made as the fact is certified in the return, at par value, with-

out regard to the true value, in excess of par. Such basis of assessment was in manifest disregard of these plain directions of the statute. 2 Hun, 585. It is an undisputed fact, appearing in the return, that the board of assessors, in the assessment of all bank stock in the city of Albany, adopted as their standard of valuation the par value of the shares whenever the actual or market value was equal to or exceeded the par value, and regardless of the actual value whenever it exceeded par. *This was a palpable violation of the laws of this state*, requiring and regulating the assessment of property for the purpose of taxation. . . . The conclusion is inevitable that it was the duty of the defendants to have assessed the shares of stock in all of the banks at their true value instead of their par value, and that *all of the assessments are unauthorized and erroneous* where the actual value of the stock is above par. *People* v. *Assessors*, 2 Hun, 583.

The Court of Appeals of the state of New York, in the case of *Williams* v. *Weaver*, 75 N. Y. 30, in which the assessors of the city of Albany were defendants, say: It may be assumed as entirely clear that the basis of assessment against the owners of shares of stock of the Albany National Exchange Bank was erroneous. These assessments were not made on the value of the shares of stock, as required by law (Session Laws 1866, c. 761), but were made at the "par value" without regard to their real value in the market. The effect of such a valuation necessarily *must be to make great inequality, and as the record in this case shows, to impose upon the shareholders whom the plaintiff represents a greater burden of taxation than that which would properly belong to them.*

II. The rule adopted by the assessors was in violation of the XIVth Amendment to the Constitution, in that it practically denied to the shareholders the "equal protection of the laws." See *County of Santa Clara* v. *Southern Pacific Railroad*, 18 Fed. Rep. 385; *County of San Mateo* v. *Same*, 13 Fed. Rep. 145.

III. The proof in this case, taken in connection with the laws of the state of New York, which are deemed to be in evidence here, and may, under the stipulation, be referred to

on any argument of the case, shows that there was practically an unlawful discrimination made against national bank stock during the years in question in the city of Albany.

IV. By the statutes of the state of New York, a vast amount of moneyed capital is and was during the years in question, exempt.

V. The court erred in excluding the evidence offered by the plaintiff to show that there was no certificate connected with the assessment roll of the sixth ward for the years 1874 and 1875; and that the only oath annexed thereto was that set forth at folio 269 of the record. Such evidence was offered in order to show that there was no valid assessment of any real or personal property in the sixth ward of the city of Albany, during the years in question; and, that, therefore, the assessments imposed upon the tax collected from stockholders of the Exchange Bank, were at a greater rate than was imposed upon other moneyed capital in said years. The evidence was objected to as not being within the issue presented by the pleadings, and under a stipulation which appears on the record, marked stipulation No. 2, which is to be found at folios 163 and 164 of the record. The courts of the state of New York have repeatedly held that an assessment without the certificate or oath prescribed by the statute is absolutely void. *Van Rensselaer* v. *Whitleede*, 7 N. Y. 517; *Hinckley* v. *Cooper*, 22 Hun, 253; *Brevoort* v. *Brooklyn*, 89 N. Y. 128.

VI. The plaintiff is certainly entitled to recover back the taxes assessed in 1873. The first two counts in the amended complaint are for taxes assessed in 1873 and collected in 1874. The Revised Statutes did not take effect until December, 1873. The assessment of the year 1873 is, therefore, to be governed by the law of 1864, which was then in operation. Under that law there was a special prohibition against taxing shares of a national bank at a greater rate than those of "any of the banks organized under authority of the state where such association is located." 13 Stat. 112, § 41. There can be no question that this restriction was violated by the assessment in question. The shares of the Mechanics and Farmers' Bank, a state bank, were assessed at the rate of only thirty-five per

cent of actual value, while those of the Exchange Bank were assessed at eighty. As to the taxes of that year, therefore, the mere fact that the shares of Mr. and Mrs. Williams, were, intentionally and by the rule above mentioned, assessed at a greater rate than those of a state bank, furnishes sufficient ground for invalidating the tax. *Van Allen* v. *The Assessors*, 3 Wall. 573.

VII. If the assessments in question should not be considered wholly void, they should be held void at least as to the excess over the average rate assessed upon other moneyed capital, and the plaintiff should have judgment for such excess.

VIII. The court properly overruled the objection to the jurisdiction of the court raised upon defendant's amended answer, at folios 160 to 162 of the record. 1. So far as the amended answer alleges that the assignment to plaintiff did not confer upon him the entire interest in the subject matter of the suit, it is well settled that the defence cannot be sustained. This matter is governed by the state practice. Rev. Stat. § 914. It has been held by the New York Court of Appeals, that if a plaintiff, suing upon an assigned claim has a valid transfer as against the assignor, and holds the legal title to the demand, the defendant has no legal interest to inquire whether the tranfer was an actual sale or merely colorable, or whether a consideration was paid therefor. In the language of Chief Judge Church, "The assignor could give the demand to the plaintiff, or sell it to him for an inadequate consideration, or without any consideration. It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment or a recovery by the assignee." *Sheridan* v. *Mayor*, 68 N. Y. 30, 32; *Stone* v. *Frost*, 61 N. Y. 614; *Allen* v. *Brown*, 44 N. Y. 228. See also *Ames* v. *Kansas*, 111 U. S. 449; *Manufacturing Co.* v. *Bradley*, 105 U. S. 175; *Williams* v. *Nottawa*, 104 U. S. 209. Even in cases arising since the act of 1875, it is held that, if the assignment is absolute, and there is no agreement to re-transfer after litigation, the court will not inquire into motives. *Collinson* v. *Jackson*, 14 Fed. Rep. 305; *Newby* v. *Oregon Central Railway*, 1 Sawyer, 63; *De Laveaga* v. *Williams*, 5 Sawyer, 573; *Marion* v. *Ellis*, 16 Fed. Rep. 410.

Mr. Wheeler H. Peckham and *Mr. S. W. Rosendale* for defendants in error.

Mr. Justice Field delivered the opinion of the court.

The act of Congress, in providing for taxation of the shares of national banks, by authority of the state in which such institutions are situated, imposes two restrictions upon the exercise of the power, namely, that the taxation shall not be at a greater rate than upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national bank owned by non-residents of the state shall be taxed in the city or town where it is located. Rev. Stat. § 5219.

In *People* v. *Weaver*, 100 U. S. 539, this court held, with reference to taxation thus authorized, that the prohibition against discrimination has reference to the entire process of assessment, and includes the valuation of the shares as well as the rate of percentage charged, and, therefore, that a statute of New York which established a mode of assessment by which such shares were valued higher in proportion to their real value than other moneyed capital in the hands of individuals, was in conflict with the prohibition, although no greater percentage was levied on such valuation. If this were not so, a rule of appraisement, applied to shares of national banks, different from one applied to other moneyed capital, might lead to such varied valuations as to materially affect the amount of taxes levied, although the same percentage should be charged on the valuations. There must be a uniform rule of appraisement of value, and the same percentage charged on the values determined, to meet the requirements of the statute.

This action is founded upon an alleged disregard of this requirement by the assessing officers of the county of Albany, New York. The plaintiff, Edward N. Stanley, is a citizen of Illinois, and, claiming to be assignee of certain shareholders of the National Albany Exchange Bank, located at Albany in New York, sues to recover the amount of certain taxes alleged to have been illegally collected from them upon their

shares in that bank during the years from 1874 to 1879, both inclusive, and paid into the treasury of the county of Albany.

The original complaint contained several counts, all of which, except the fourth, were substantially the same, except as to the names of the stockholders and the amounts assessed and collected. They alleged the assessment by the board of assessors of the city of Albany of the shares held by the assignors of the plaintiff, acting under color of an act of the legislature of New York, passed April 23, 1866, being chapter 761 of the laws of that year, at $100 a share, being the par value thereof, after deducting therefrom such sum as was in the same proportion to such par value as was the assessed value of the real estate of the banking institution to the whole amount of its capital stock, and the collection of the amount levied, and its payment into the treasury of the county of Albany. They also alleged, upon information and belief, that chapter 761 of the laws of 1866 was in conflict with the laws of the United States, and especially with the provision that taxation by state authority of shares of stock in banking associations shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, for the reason, among others, that the said act of New York did not permit debts of the owners of the bank stock to be deducted from the value thereof in its assessment, although such deduction of the debts of the owner was at the time, and is still, permitted and required by the laws of New York to be made from the value of every other kind of personal property, and moneyed capital other than bank stock, in assessing the same for the purpose of taxation.

They also alleged, upon information and belief, that the assessment of the shares of stock of the said banking association by the board of assessors was at a greater rate than their assessment upon shares of stock of banks organized under the laws of New York and located in the same ward of the city, and was at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state. For these reasons the plaintiff alleged that the assessment of the shares of stock, and the levy of the tax thereunder, were

illegal and void, and that the money received therefor was wrongfully collected and paid into the county treasury, and belonged of right to the shareholders, and not to the county.

The fourth count differed from the others in averring that the assignor of the plaintiff named in this count, Chauncey P. Williams, had presented to the board of assessors an affidavit stating that the value of his personal estate, including his bank stock, after deducting his just debts and property invested in the stock of corporations or associations liable to be taxed therefor, and his investments in the obligations of the United States, did not exceed one dollar, and requested the board of assessors to reduce his assessment to that amount, but that the board had refused to make such reduction; and that thereupon said Williams applied to the Supreme Court of the state for a writ of mandamus to compel the assessors to make the reduction; that the Supreme Court denied the application on the ground that the act of the legislature did not permit such reduction, but required the assessment of the bank stock at its full value; that the Court of Appeals of the state, on appeal, affirmed the decision and judgment of the Supreme Court; that the Supreme Court of the United States reversed the judgment of the Court of Appeals, and held that the statute, c. 761 of the laws of the state of 1866, in that it did not permit a reduction for indebtedness from the assessment of bank stock, which by the laws of the state was required to be made from the assessment of every other kind of personal estate and moneyed capital, was in conflict with the laws of the United States.

The answer of the defendant consisted in a specific denial of the several allegations of the complaint, with an averment that the assessments were duly and regularly made by a board of assessors having jurisdiction of the matter. In a supplementary answer the defendant also set up that the assignment of the amounts in suit to the plaintiff was improperly and collusively made for the purpose of giving the court jurisdiction.

The action was twice tried, at both times by the court without the intervention of a jury, by consent of parties.

Opinion of the Court.

On the first trial, which took place in October, 1880, the plaintiff recovered the whole amount upon the first ground stated, that the act of New York, c. 761 of the laws of 1866, was in conflict with the act of Congress, in not permitting in the assessment of the value of the stock of the bank a reduction for the debts of the holder. The second ground of objection to the validity of the assessment, that it was at a greater rate than was assessed on other moneyed capital in the hands of individual citizens, was not considered. The case was then brought to this court for review. After full consideration, we held substantially this: that the statute of New York was in conflict with the act of Congress, so far as it did not permit a stockholder of a national bank to deduct the amount of his just debts from the assessed value of his stock, while by the laws of the state the owner of all other personal taxable property was allowed to deduct such debts from its value; but that neither the statute nor the assessment under it was for that reason void. If the stockholder had no debts to deduct, the mode of assessment adopted was not invalid as to him; he could not complain of it, nor recover the taxes paid pursuant to it. If he had debts, the assessment without a deduction for them in the estimate of the taxable value of the stock was only voidable. The assessing officers, in making the assessment, were acting within their authority until duly notified of the debts which were to be deducted. In such case, therefore, the duty devolved upon the stockholder to show to the assessing officers what his debts were, and to take such steps as were required by the law to obtain a correction of the over-assessment. We, therefore, decided that for the taxes collected upon the assessment alleged in the fourth count the plaintiff was entitled to judgment; this court having held, in *People* v. *Weaver*, 100 U. S. 539, that assessment invalid, for the reason that the assessors had not allowed any deduction for the debts of the stockholder, but that for the taxes collected upon the assessments alleged in the other counts, no recovery could be had; the stockholders there mentioned not having produced any evidence that they had presented to the assessors an affidavit of the amount which they would be entitled to de-

duct from the assessment of their shares, if the same rule had been applied to the assessment of bank shares which was applied to the assessment of other personal property, or any evidence that they owed anything whatever to be deducted, or that they had taken any steps under the laws of New York to correct the over-assessment complained of. The judgment of the Circuit Court was accordingly reversed, and judgment ordered for the plaintiff upon the fourth count, and for the defendants on the other counts. *Supervisors* v. *Stanley*, 105 U. S. 305, 316.

Subsequently, upon the attention of the court being called to the fact that there was evidence in the case upon the allegation that the assessment of the shares of stock in the national banking association was at a greater rate than was assessed upon shares of stock in banks organized under the laws of New York, and located in the same city, and at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of the state, upon which the court below did not pass, the judgment was so far modified as to permit that court, in its discretion, to hear evidence on that point, and, if necessary, to allow an amendment of the pleadings to present it properly.

When the case was remanded, on application to the Circuit Court, all the counts except the fourth were amended. The substance of the amendments consisted in allegations that the assessors, by a rule prescribed by themselves, assessed the shares of the National Albany Exchange Bank at such greater rate; that the rule adopted was to assess all shares of stock in state and national banks in the city of Albany at par, without regard to their actual or market value, making the requisite deduction for real estate owned by the banks; that this rule necessarily resulted in imposing upon the shares of the National Albany Exchange Bank a greater rate of taxation than was assessed upon other moneyed capital generally; that there were in the sixth ward of the city, at the time of the assessments, several banks, state and national; and that the actual value of the stock of the banks varied, that of the shares of stock in the National Albany Exchange Bank being

considerably less than that of the stock of most of the other banks in the city.

Several of the counts were afterwards abandoned, those remaining applying only to the taxes of the years 1873, 1874, and 1875. The case came on for a second trial in March, 1883, and, after hearing the proofs, the court filed its findings of fact on the issues presented by the pleadings, and gave judgment for the plaintiff on the fourth count, and for the defendants on the other counts. To review this judgment the case is brought to this court on a writ of error.

Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it; to its finding of particular facts; and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Thus, the principal finding of the court is, "That the plaintiff has failed to establish the allegations in said complaint, that the several assessments herein referred to were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this state." And the first assignment of error is, that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition; which is nothing more than that the court below found against the evidence — a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. Act of March 3, 1865, 13 Stat. c. 86, § 4; Rev. Stat. § 700.

The same answer will apply to the exceptions taken to the

refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered — a matter determinable only in the court below.

To recover in this case, the plaintiff was required to prove, under the decision when the case was first here, that "the assessors habitually and intentionally, or by some rule prescribed by themselves, or by some one whom they were bound to obey, assessed the shares of the national banks higher, in proportion to their actual value, than other moneyed capital generally."

The court below specially found the negative of this; that the assessors did not, at any of the times in question, habitually or intentionally, or by any rule prescribed by themselves, or by any one whom they were bound to obey, thus assess the shares of national banks.

The counsel for the plaintiff insists, however, notwithstanding this finding, that the inference of such habitual assessment at a higher rate follows from the findings, that within the city of Albany there were nine banks, and that the actual value of the shares in all of them except one exceeded their par value, varying in that respect from 10 to 70 per cent premium, and yet the value of all was assessed at par. The actual value of shares of the National Albany Exchange Bank was 35 per cent above par, and the actual value of the shares of some of the other banks was above and some below that figure. The court found that the method pursued by the assessors was generally satisfactory to the owners of national bank stock in the city of Albany, with the exception of a few stockholders in the National Albany Exchange Bank, and that such method was pursued by the assessors with no purpose or intention of unduly assessing shares of national banks, but simply because it was thought by them to be the most satisfactory one to the owners of such property, and the best in itself. A different method might have led to perplexing difficulties, owing to the great fluctuations to which shares in banking institutions are subject, their value depending very much on the skill and wisdom of the managers of those insti-

tutions. Intelligent men constantly differ in their estimate of the value of such property, and the stock market shows almost daily changes. Presumptively, the nominal value is the true value, any increase from profits going, in the natural course of things, in dividends to the stockholders. This method, applied to all banks, national and state, comes as near as practicable, considering the nature of the property, to securing, as between them, uniformity and equality of taxation; it cannot be considered as discriminating against either. Both are placed on the same footing. In *Mercantile National Bank of New York* v. *The State of New York*, 120 U. S. 138, 155, recently decided, this court said: "The main purpose, therefore, of Congress in fixing limits to state taxation on investments in the shares of national banks was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring individuals or institutions carrying on a similar business and operations and investments of a like character. The language of the act of Congress is to be read in the light of this policy."

The method pursued could in no respect be considered as adopted in hostility to the national banks. It must sometimes place the estimated value of their shares below their real value; but such a result is not one of which the holders of national bank shares can complain. It must sometimes lead also to over-valuation of the shares; but, if so, no ground is thereby furnished for the recovery of the taxes collected thereon. It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Over-valuation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. *Newman* v. *Supervisors*, 45 N. Y. 676, 687; *National Bank of Chemung* v. *Elmira*, 53 N. Y. 49, 52; *Bruecher* v.

The Village of Portchester, 101 N. Y. 240, 244; *Lincoln* v. *Worcester*, 8 Cush. 55, 63; *Hicks* v. *Westport*, 130 Mass. 478; *Balfour* v. *City of Portland*, 28 Fed. Rep. 738.

In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them — of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some states is complied with, when designed and manifest departures from the rule are avoided.

To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed.

When the over-valuation of property has arisen from the adoption of a rule of appraisement which conflicts with a con-

stitutional or statutory direction, and operates unequally not merely on a single individual but on a large class of individuals or corporations, a party aggrieved may resort to a court of equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due. This was the course pursued and approved in *Cummings* v. *National Bank*, 101 U. S. 153. In that case it appeared that the officers of Lucas County, Ohio, charged with the valuation of property for the purposes of taxation, adopted a settled rule or system by which real estate was estimated at one third of its true value, ordinary personal property about the same, and moneyed capital at three fifths of its true value. The state board of equalization of bank shares increased the valuation of them to their full value. Upon a bill brought by the Merchants' National Bank of Toledo against the treasurer of the county, in which the bank was established, to enjoin him from collecting taxes assessed on the shares of the stockholders, payment of which was demanded of the bank under the law, it was held that the rule or principle of unequal valuation of the different classes of property for taxation adopted by the board of assessment was in conflict with the constitution of Ohio, which declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and, also, all the real and personal property according to its true value in money," and worked manifest injustice to the owners of shares in national banks; and that the bank was, therefore, entitled to the injunction against the collection of the illegal excess, upon payment of the amount of the tax which was equal to that assessed on other property. That decision was rendered upon a disregard by the assessing officers of a rule prescribed by the constitution of the state, but the same principle must apply when their action in assessing the shares of national banks is in disregard of the act of Congress. The plaintiff below did not think proper to resort to this method of obtaining relief, which would have given him all he was entitled to, if in fact his shares were assessed at a greater rate than was assessed on other moneyed capital, because of their illegal over-valuation.

Statement of Facts.

It only remains to notice the exceptions taken to the exclusion of the testimony offered, that the law of New York required an oath or certificate to be annexed to the assessment roll substantially different from the oath actually annexed, and the claim that the plaintiff has a right to recover the taxes assessed in 1873 and collected in 1874. The exclusion of the testimony as to the alleged defect in the assessment roll was correct under the stipulation of the parties, that the plaintiff would not claim a right to prove any failure of the assessors to take the proper oath. A defect in the form of the oath annexed, if there be one, could have no bearing upon the question at issue. The claim for the taxes assessed in 1873 is open to similar objections to those presented against the claim for the taxes of the other years. If the assignors of the plaintiff had any just grounds of complaint to the assessment as excessive they should have pursued the course provided by statute for its correction, or resorted to equity to enjoin the collection of the illegal excess, upon payment or tender of the amount due upon what they conceded to be a just valuation.

It follows that the judgment of the court below must be affirmed; and it is so ordered.

FROST *v.* SPITLEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

Argued April 19, 20, 1887. — Decided May 2, 1887.

A bill in equity to quiet title cannot be maintained, either under the general jurisdiction in equity, or under the statute of Nebraska of 1873, by one having an equitable title only.

This case, so far as is material to the understanding of the appeal, was a bill in equity by Martin Spitley, a citizen of Illinois, against George W. Frost and wife, citizens of Ne-

braska, Thomas C. Durant, a citizen of New York, and The Credit Mobilier of America, a corporation of Pennsylvania, alleging that the plaintiff was entitled to two lots of land in the city of Omaha, county of Douglas, and State of Nebraska, under a sale on execution against Frost to one John I. Redick, and a conveyance from Redick to the plaintiff, and praying for a decree quieting the plaintiff's title and ordering a conveyance to him of the legal estate. Frost and wife, by answer and cross bill, denied the validity of the sale on execution, and claimed the land as a homestead. After the completion of the pleadings between Spitley and Frost and wife, the case was referred to a master, whose report was confirmed by the Circuit Court, and a final decree was entered for Spitley on his bill against Frost and wife, their cross bill was dismissed, and they appealed to this court. Durant and the Credit Mobilier were not served with process, the record did not show publication of the notice ordered to them upon either bill, they did not appear in the cause, no decree was rendered against them, and they were not made parties to the appeal.

The material facts, as appearing by the admissions in the pleadings, the master's report, and the evidence taken in the case, were as follows:

Prior to 1866, the Credit Mobilier, in whose employ Frost was, purchased the land in question, took the title in the name of Durant, its president, and built a house upon it for the use of Frost and his family, under an agreement between the corporation and Frost, by which the title was to be conveyed to him upon a final settlement between them. Frost and his family forthwith took possession of the land, and thenceforth occupied it as a homestead, and were in possession when this bill was filed.

On November 11, 1870, Redick, who was an attorney, and Frost made and signed the following agreement: "In consideration of $2500 as attorney's fees, I agree with Hon. G. W. Frost that I will bring suit and procure, through the courts or otherwise, to him a good title to the premises he, said Frost, now occupies as his residence in the city of Omaha; and in

case [of] any settlement or arrangement of the suit, then said Frost is to pay in proportion only; and in case said Frost fails to procure said title at all, then the said attorney is to have a mere nominal fee for his services, to wit, $100."

Redick accordingly, on April 29, 1871, brought a suit in equity on behalf of Frost against the Credit Mobilier and Durant in the courts of Nebraska, and in that suit on March 27, 1876, obtained a decree that upon Frost's paying to said defendants within thirty days the sum of $302.71 remaining due from him to them, they should convey the land to him. That sum was not paid within the time fixed, Frost contending that Redick, by the agreement between them, was bound to pay it. On November 11, 1876, said defendants executed a quitclaim deed to Frost, but it was never delivered to him or recorded. Durant afterwards brought an action of ejectment for the land against Frost, which was pending until June 8, 1880, when Redick, having been made a defendant therein on the ground of his having succeeded to Frost's rights in the property under the proceedings stated below, paid that sum, with interest, and the action of ejectment was thereupon dismissed.

On June 26, 1877, Redick brought an action at law to recover his fee of $2500 against Frost in the Circuit Court of the United States for the District of Nebraska, in which, on July 30, 1877, he obtained a writ of attachment, on which this land was attached, and was appraised at $6000; on March 14, 1878, recovered judgment; and on July 1, 1878, obtained an order of sale as upon execution, on which this land was appraised, "after deducting all prior liens thereon," at $500, the appraisers adding, "The said defendant's only interest in said property, as appears by the records of Douglas County, Neb., being that of occupancy and possession, we appraise the said interest as above;" and the marshal, on August 24, 1878, after thirty days' advertisement of "the property described in this order," sold by auction Frost's interest in these lots to Redick for $350. Frost's solicitor, at the time of the sale, gave notice to the marshal that Frost claimed the land as his homestead, and afterwards moved the court to set aside

the sale for this and other reasons. But the court, upon a hearing, confirmed the sale, and directed the marshal to execute and deliver to Redick a deed in the usual form, which was accordingly done; and Redick, on September 8, 1880, conveyed to Spitley, the present appellee.

Mr. John L. Webster for appellants.

No appearance for appellee.

Mr. Justice Gray, after stating the case as above reported, delivered the opinion of the court.

The opinion of the Circuit Court proceeded upon the grounds that Frost's homestead right, as against the contract made by him with Redick in 1870, and the judgment and execution afterwards obtained by Redick on that contract, was governed by the homestead act of Nebraska of 1866, by which no consent of the wife to an alienation of the homestead was required; and that the sale on execution, confirmed by the court, cut off the right of homestead. 5 McCrary, 43. But it is unnecessary to consider the validity of either of those grounds, because, even if they are well taken, Spitley's bill cannot be maintained.

At the time of the sale on execution of Frost's interest in the land, the legal title was, and it still remains, in Durant. Although Frost, under his agreement with Durant and the corporation, and the decree which he had recovered against them, had been entitled to a deed of the land upon the payment of a certain sum of money, he had not paid the money, nor had any deed been delivered to him; so that his title, either by virtue of the agreement and decree, or by virtue of his occupation of the land as a homestead, never was anything more than an equitable title. The sale on execution against him (if valid and effectual) and the deed of the marshal passed only his equitable title to Redick; Redick's payment to Durant of the money unpaid by Frost did not divest Durant of his legal title; and Redick's subsequent conveyance to Spitley could pass no greater right than Redick had. Spitley's

title, therefore, at best, is but equitable, and not legal; and Frost, and not Spitley, is in actual possession of the land.

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. *Alexander* v. *Pendleton*, 8 Cranch, 462; *Piersoll* v. *Elliott*, 6 Pet. 95; *Orton* v. *Smith*, 18 How. 263; *Crews* v. *Burcham*, 1 Black, 352; *Ward* v. *Chamberlain*, 2 Black, 430. As observed by Mr. Justice Grier in *Orton* v. *Smith*, "Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." 18 How. 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment. *United States* v. *Wilson*, 118 U. S. 86; *Fussell* v. *Gregg*, 113 U. S. 550.

It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent, (which he cannot compel the United States to issue to him,) and is deemed the legal owner, so far as to render the land taxable to him by the state in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession. *Carroll* v. *Safford*, 3 How. 441, 463; *Van Wyck* v. *Knevals*, 106 U. S. 360, 370; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 169. But no such case is presented by the record before us.

In *Stark* v. *Starrs*, 6 Wall. 402, the suit was founded on a statute of Oregon, authorizing "any person in possession" to bring the suit; the court, after observing that "his possession must be accompanied with a claim of right, legal or equitable," held that the plaintiff proved neither legal nor equitable title; and consequently the question whether an equitable title only

would have been sufficient to maintain the suit was not adjudged. In *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, the decision was based upon a statute of Indiana, under which, as construed by the Supreme Court of that state, an equitable title was sufficient, either to support or to defeat the suit. *Jefferson Railroad* v. *Oyler*, 60 Indiana, 383; *Burt* v. *Bowles*, 69 Indiana, 1. See also *Grissom* v. *Moore*, 106 Indiana, 296.

A statute of Nebraska authorizes an action to be brought "by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Nebraska Stat. February 24, 1873, Rev. Stat. 1873, p. 882. By reason of that statute, a bill in equity to quiet title may be maintained in the Circuit Court of the United States for the District of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for. *Holland* v. *Challen*, 110 U. S. 15, 25. The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bills. Under that statute, as under the general jurisdiction in equity, it is "the title," that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In *State* v. *Sioux City & Pacific Railroad*, the Supreme Court of Nebraska said, "Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title, in order to maintain the action." 7 Nebraska, 357, 376. And in *Holland* v. *Challen*, above cited, this court said, "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises."

The necessary conclusion is, that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title; he cannot maintain it for the purpose of compelling a conveyance of the legal title, because Durant, in whom that title is vested, though named as a defendant, has not been served with process or

appeared in the cause; and for like reasons Frost and wife cannot maintain their cross bill.

Decree reversed, and case remanded to the Circuit Court, with directions to dismiss the appellee's bill, and the appellants' cross bill, without prejudice, the appellee to pay the costs in this court and in the Circuit Court.

METROPOLITAN RAILROAD COMPANY *v.* MOORE.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Argued April 21, 1887. — Decided May 2, 1887.

An appeal lies to the general term of the Supreme Court of the District of Columbia from a denial by that court in special term of a motion for a new trial, made on the ground that the verdict was against the weight of evidence; but the legal discretion of that court respecting the disposition of such a motion is not reviewable in this court.

Stewart v. *Elliott*, 2 Mackey, 307, overruled.

When Congress adopts a state system of jurisprudence, and incorporates it, substantially in the language of the state statute creating it, into the Federal legislation for the District of Columbia, it must be presumed to have adopted it as understood in the State of its origin, and not as it might be affected by previous rules of law, either prevailing in Maryland, or recognized in the courts of the District.

This was an action at law, brought by the defendant in error, in the Supreme Court in the District of Columbia, against the plaintiff in error, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant's servants in the management of its cars while running upon a street railroad in the city of Washington. On the trial of the cause, and after the testimony for the plaintiff was closed, the defendant asked the court to instruct the jury that, upon the testimony offered in behalf of the plaintiff, he was not entitled to recover. This was refused, and an exception taken. The jury returned a verdict in favor of the plaintiff for $5000, on which judgment was rendered. The defendant thereupon filed a motion for a new trial on the

following grounds: 1st, because the verdict was against the weight of evidence; 2d, because the verdict was against the instructions of the court; 3d, because the damages awarded by the jury were excessive; and also upon exceptions taken at the trial.

The record then showed the following proceedings: "The motion for a new trial coming on to be heard upon the pleadings, the testimony, and the rulings of the court as set forth in said pleadings, and in the stenographic report filed herewith and marked Exhibit A, which said report contains all the testimony in the case and the rulings of the court, the same is hereby overruled; and from the order of the court overruling said motion the defendant hereby appeals to the court in general term. And thereupon the defendant, by its said attorney, tenders to the court here its bills of exception to the rulings of the court on the trial of this case, and prays that they may be duly signed, sealed, and made a part of the record now for then, which is done accordingly." The bills of exception stated the rulings of the court during the progress of the trial with the evidence applicable thereto, and Exhibit A, referred to in the order of the court overruling the motion for a new trial, set out in full all the testimony in the case.

The record then showed the proceedings and judgment on the appeal in the general term, as follows: "Now again come here as well the plaintiff as the defendant, by their respective attorneys, whereupon, it appearing to the court that the order of the court below overruling the motion for a new trial on a case stated, upon the ground that the verdict of the jury was against the weight of evidence, is not an order from which an appeal lies to this court, and it also appearing to the court that the defendant's exceptions to the admissibility of evidence and to the rulings and instructions of the court were not well taken, the said appeal is hereby dismissed, and the motion for a new trial on exceptions is now overruled, and the judgment of the court is affirmed, with costs." The defendant below sued out the present writ of error.

Argument for Defendant in Error.

Mr. Nathaniel Wilson and *Mr. Walter D. Davidge* for plaintiff in error.

Mr. Frank T. Browning and *Mr. William F. Mattingly* for defendant in error.

An alleged error relied on by the plaintiff in error is that the court below, in general term, held that the order of the Circuit Court overruling its motion for a new trial, "because the verdict was against the weight of evidence," is not an order from which an appeal lies to this court.

Sections 804 and 805 of the Rev. Stat. D. C. provide that the justice who tries the cause may, in his discretion, entertain a motion to be made on his minutes, to set aside a verdict and grant a new trial upon *exceptions*, or for *insufficient evidence*, or for *excessive damages*, and that when such motion is heard, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

An appeal to the general term is not provided for when the motion for a new trial is based upon any other than these grounds. All other grounds for a motion for a new trial are necessarily addressed to the discretion of the court and are not appealable.

The defendant below abandoned its motion on the ground of excessive damages and none of the other grounds for a new trial, specified in the motion, came within the provision of law granting an appeal.

It is forced now to claim that the *insufficient evidence* in the wording of the law is the same as against the weight of evidence.

We submit that there is a marked difference between the two. The one looks to the legal sufficiency of the evidence to justify the verdict, the other assumes that there was evidence sufficient in law to warrant the verdict, but that the preponderance of the evidence was against the verdict. In the former case the verdict is properly reviewable by an appellate court, in the latter not. This court in 12 Pet. 345, *Hepburn*

v. *Dubois*, held that after a verdict in favor of either party on the evidence, he has the right to demand of a court of error that they look to the evidence only to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party.

The court below in *Stewart* v. *Elliott*, 2 Mackey, 311, reviews the history of the provisions of our statute and holds in express terms (p. 315), that the phrase "for *insufficient evidence*," cannot be construed as authorizing the general term to consider whether a verdict below was "contrary to the evidence," or "against the weight of evidence."

In the case at bar it appears that the evidence was sufficient, by the overruling of the demurrer to the evidence, which was sustained by the general term. The evidence is brief, and a simple perusal of it would show that the defendant below was in no way injured by the court holding that it had no jurisdiction of the appeal, on the ground that the verdict was against the weight of the evidence.

Mr. Justice Matthews, after stating the case as above reported, delivered the opinion of the court.

The assignment of error relied on, and the only one we find it necessary to consider, is, that the court in general term refused to entertain the appeal from the action of the court at special term, overruling the motion for a new trial, so far as it was based on the ground that the verdict of the jury was against the weight of evidence, because it was not an order from which an appeal lies from the special to the general term of the court.

The opinion of the court, which is sent up with the record, expressly considers, discusses, and decides all the questions arising on the bills of exception, but no reason is given for that part of the judgment refusing to consider the appeal so far as it rested upon the order of the court at special term, overruling the motion for a new trial, based on the ground that the verdict of the jury was against the weight of evidence. It was said in argument at the bar that this was because, a few

weeks before, in the case of *Stewart* v. *Elliott*, 2 Mackey, 307, decided March 13, 1883, the Supreme Court of the District of Columbia had given a carefully considered opinion concerning the very point in controversy. It was decided in that case that the right of appeal on motions for a new trial from the special to the general term was given only in three cases: 1st, where the motion is based on exceptions taken during the progress of the trial; 2d, where the verdict has been rendered upon insufficient evidence; and 3d, for excessive damages. It was also decided that a verdict against the weight of evidence cannot be said to be a verdict upon insufficient evidence; the term "insufficient evidence," in § 804 of the Revised Statutes of the District of Columbia being construed as meaning evidence not sufficient in law to support a verdict. It therefore held that a motion for a new trial, because the verdict was against the weight of evidence, is left by the statute entirely within the discretion of the judge at special term trying the case, and that no appeal lies from his determination to the general term.

The sections of the Revised Statutes of the United States relating to the District of Columbia, affecting the question, are as follows:

"Sec. 753. The several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by law, are declared to be, severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings, and acts of the general terms, special terms, circuit courts, district courts, and criminal courts rendered, made, or had, are and shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of the Supreme Court; but nothing contained in this section shall affect the right of appeal, as provided by law.

* * * * *

"Sec. 772. Any party aggrieved by any order, judgment, or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the Supreme Court, and, upon such appeal, the general term shall review such order,

judgment, or decree, and affirm, reverse, or modify the same, as shall be just.

* * * * *

"Sec. 800. Non-enumerated motions in all suits and proceedings at law and in equity shall first be heard and determined at special terms. Suits in equity, not triable by jury, shall also be heard and determined at special terms. But the justice holding such special term may, in his discretion, order any such motion or suit to be heard, in the first instance, at a general term.

* * * * *

"Sec. 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice and afterward settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed.

"Sec. 804. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motions shall be made at the same term at which the trial was had.

"Sec. 805. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner.

"Sec. 806. A motion for a new trial on a case or bill of exceptions, and an application for judgment on a special verdict, or a verdict taken subject to the opinion of the court, shall be heard in the first instance at a general term."

The construction given by the court below to § 804 of the Revised Statutes is that it does not limit "the range of reasons for which the new trial might be granted by the judge who heard the cause;" but that "the only purpose of the enumeration in the section was to designate the cases in

which an appeal might be taken to the general term from the order of the trial justice refusing a new trial; and this enumeration constituted an effective limitation of the right of appeal to the three cases mentioned, viz.; where the motion has been urged either '*upon exceptions*, or *for insufficient evidence*, or *for excessive damages*.' In no other case was an appeal to be allowed." *Stewart* v. *Elliot*, 2 Mackey, 307, 313.

But this construction of the statute overlooks the operation and effect of § 772. By that section an appeal will lie from the special to the general term from any order, judgment, or decree, "if the same involve the merits of the action or proceeding." Certainly, motions for a new trial upon grounds other than those recited in § 804 are included in this description. A motion may be made to set aside a verdict and grant a new trial on the ground that the verdict is against law, or against the instructions of the court, or for newly discovered evidence, or because the amount is less than it should have been where the damages are ascertainable by some fixed rule of law, or for misconduct of the jury, or for fraud practised by the successful party. None of these cases are specifically recited in § 804, and yet, if we adopt the construction put upon that section by the Supreme Court of the District of Columbia, no appeal can be had from the judgment of a special term in any of them, although they involve the merits of the action or proceeding as completely as any of those mentioned in § 804.

It is the evident purpose and meaning of § 772 to give the right of appeal from the special to the general term from every order, judgment, or decree involving the merits of the action or proceeding. There is nothing in the other sections referred to which necessarily limits that right, and any construction of their language which has that effect is unwarranted. Their object is not to specify the cases in which the action of the special term upon motions for a new trial may be reviewed on appeal by the general term. Section 804 by itself merely provides that the justice who tries the cause at special term may, in his discretion, entertain or refuse to entertain a motion to be made on his minutes to

set aside a verdict and grant a new trial for the grounds therein mentioned. If he entertains the motion, and hears it, then by § 805 an appeal will lie to the general term from the decision. The form of that appeal is by means of a bill of exceptions or case, which shall be settled in the usual manner. Of course, if the ground of the motion for a new trial is for insufficient evidence, or for excessive damages, the bill of exceptions or case for the appeal must contain a statement of all the evidence offered and received on the trial, because it must bring to the general term all the material necessary to enable it to act upon the appeal precisely as the judge at special term acted upon the motion. If, however, the judge at special term exercises his discretion under § 804, by refusing to entertain the motion for a new trial to be made on his minutes, then the party moving for the new trial may, under § 806, predicate his motion on a case or bill of exceptions, containing, as in the former instance, all the evidence, and in that event the motion shall be heard in the first instance at a general term.

The proper conclusion in reference to motions for a new trial upon other grounds than those specified in § 804 would seem to be, that in such cases the justice who tries the cause would have no discretion in reference to entertaining them, but is required to consider them in the first instance, of course with the right of appeal to the general term from his action, as provided by § 772. Section 806 mentions the cases in which the hearing on a motion for a new trial shall be heard in the first instance at a general term. Section 804 provides for cases in which, according to the discretion of the justice who tries the cause, the hearing of the motion may be had before him on his minutes in the first instance at a special term. Section 770 gives authority to the Supreme Court of the District of Columbia, in general term, to "determine by rule what motions shall be heard at a special term, as non-enumerated motions, and what motions shall be heard at a general term in the first instance." This power of discrimination by rule is, of course, subject to the statutory provisions contained in §§ 800, 804, 805 and 806; but

in every instance the order, judgment, or decree, made or pronounced at any special term, if it involve the merits of the action or proceeding, may be the subject of an appeal to the general term of the Supreme Court by virtue of § 772. Even in cases of motions not involving the merits, such as non-enumerated motions, which by § 800 it is said "shall first be heard and determined at special terms," it is also provided by the same section that "the justice holding such special term may, in his discretion, order any such motion or suit to be heard in the first instance at a general term."

It may be said that this construction of § 772 renders § 805 superfluous. If the former section, it may be said, secures the right of appeal from every order involving the merits, there was no necessity in § 805 for expressly granting it in the cases therein referred to. If this were true, it could not, we think, limit the operation of § 772. It must have effect according to its express terms and evident meaning; and a reason may be found for the introduction of § 805, as intended, by way of more abundant caution, to exclude a possible contrary conclusion, or to show that the appeal must be upon a bill of exceptions or a case.

If § 805 is construed to limit the appeal to the general term to the particular cases mentioned in § 804, it may with equal force be contended that the enumeration of the particular motions, which by the latter section the justice, at special term, is permitted to entertain, by a necessary implication denies to him the power to consider motions for a new trial based on any other reasons. The language of the section is, that the judge, at special term, may, in his discretion, entertain the motions therein specified. No other section professes to confer power upon the court, at special term, to consider motions for a new trial of any other description. Can it thence be inferred that no such power exists? That conclusion is rejected by common consent. How, then, can it be said that § 805, which recognizes the right of appeal only in the cases specified in § 804, by implication denies it in every other? It might more plausibly be argued that all other cases, not included in §§ 804 and 805, are within the provisions of § 806, and may, in the first in-

stance, be heard at a general term in the form of a case or bill of exceptions, containing the necessary predicates for their support. But the only consistent interpretation to be placed on the whole enactment is that which secures the right of appeal, under § 772, from the special to the general term, in every case of an order, judgment, or decree which involves the merits of the action or proceeding, and which is not otherwise specially provided for. The object of §§ 804 and 805 seems to be to provide for a special class of cases, in which discretion is given to the justice, at special term, to hear or to refuse to hear motions for a new trial, providing, in the first case, for an appeal in the usual manner, and in the latter case, when he refuses to hear the motion, leaving it to be heard, under § 806, on a case or bill of exceptions, in the first instance, in the general term.

Upon this view of these statutory provisions, it is immaterial whether the motion for a new trial made in this case, so far as it was based on the ground that the verdict was against the weight of evidence, is embraced by § 804 as a motion to set aside a verdict for insufficient evidence; because, if it is not, still, as we have seen, an appeal lies by virtue of § 772 from the order of the special term denying the motion, because it involved the merits of the action. Nevertheless, we are of the opinion that the proper construction of § 804 embraces a motion for a new trial on the ground that the verdict is against the weight of evidence, as being within the terms "for insufficient evidence," as used in that section.

Upon this point, the Supreme Court of the District of Columbia, in *Stewart* v. *Elliott*, 2 Mackey, 307, 315, said: "By a loose use of language, it may be said that a verdict '*contrary to the evidence*,' or 'against the weight of evidence,' was rendered upon '*insufficient evidence*;' and, on the other hand, that a verdict upon insufficient evidence is one contrary to or against the weight of evidence. But we are dealing with legal expressions in their technical meaning; and it is familiar to all lawyers that evidence offered to a jury in a cause has a twofold sufficiency, *i. e.*, sufficiency in law and sufficiency in fact; that of its sufficiency *in law* the court is the exclusive judge; its sufficiency *in*

fact is a question exclusively for the jury. The court, in considering the legal sufficiency of the evidence to sustain the case of a suitor, or to establish any particular fact essential to his recovery, must examine the proof with respect to its quality and quantity; and this determination by the court is a question of law. And if the court can see that the proof offered is of such a character and volume that it might well satisfy a rational mind of the truth of the position it is introduced to maintain, then it is declared to be *legally sufficient* for the purpose; and it must be submitted to the jury, who are the exclusive judges of its sufficiency *in fact*, whether others may differ from them in their conclusions or not. As expressed in a recent decision in Maryland, following numerous familiar cases 'if no evidence is offered, or if it is not such as one in reason and fairness could find from it the fact sought to be established, the court ought not to submit the finding of such fact to the jury.' *Griffith* v. *Diffenderfer*, 50 Maryland, 466. To the same effect is the language in 40 N. Y. Superior Ct. (8 Jones & Spencer) 181, *Halpin* v. *Third Avenue Railroad Co.*: 'If there is no conflict in the evidence, its sufficiency is no longer a question of fact, but becomes a question of law to be determined by the court.' It is to this *legal sufficiency* that the statute refers when it authorizes the appeal to this court, and to that inquiry alone have we the right to address an examination."

The court in the same opinion uses the following language (p. 314): "There is not the slightest desire upon our part to circumscribe the methods by which, according to the long established practice in this jurisdiction, the losing party may apply in the trial court for a new trial. The courts of justice would lose much of their value unless this mode of redress against unjust verdicts was tenaciously preserved by the judge, to be applied in his discretion where he believed the jury have done manifest injustice by returning a verdict against the weight of the evidence."

We see no reason, however, for supposing that the language in § 804, "for insufficient evidence," is to be limited to evidence insufficient in point of law. The words themselves do

not import any distinction. It is admitted that according to established rules of procedure in such cases, it is customary and proper for courts of justice, sitting in the trial of causes by jury, to set aside verdicts and grant new trials in both classes of cases; that is, where the verdict rests upon evidence which is either insufficient in law or insufficient in fact. Strictly speaking, evidence is said to be insufficient in law only in those cases where there is a total absence of such proof, either as to its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two; or when the alleged agreement was proven to be verbal, when the law required it to be in writing. In such cases, a verdict might be said to be against law, because founded on insufficient evidence. Insufficiency in point of fact may exist in cases where there is no insufficiency in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion. This is illustrated by the case of *Algeo* v. *Duncan*, 39 N. Y. 313, 316. This was an action on a promissory note, and the plaintiff's *prima facie* case was fully made out; the defence arose upon a plea of infancy, which was also fully proved, there being no evidence to contradict or discredit the testimony upon that point, and yet the jury returned a verdict for the plaintiff. In that case it was decided that a motion to set aside the verdict "for insufficient evidence" was properly made and entertained. Judge Woodruff, delivering the opinion of the court, said: "The term 'insufficient evidence,' as used in the Code, should be considered with reference to the actual issue upon which the jury were to pass, and not less with reference to the whole state of the case made by the adverse party. Suppose the sole issue in a given case was upon a plea of release. The defendant, having the affirmative of that issue, produces and proves a release under the hand and seal of the plaintiff, and the latter gives no evidence in avoidance of the release suffi-

cient to warrant the submission of any question to the jury, and yet the jury find for the plaintiff. It is true that such a verdict would be against the defendant's conclusive evidence, but it is equally true that such a verdict is without any sufficient evidence."

So upon the whole evidence in the case the testimony in support of the cause of action, or of the defence, may be so slight, although competent in law, or the preponderance against it may be so convincing, that a verdict may be seen to be plainly unreasonable and unjust. In many cases it might be the duty of the court to withdraw the case from the jury, or to direct a verdict in a particular way; and yet, in others, where it would be proper to submit the case to the jury, it might become its duty to set aside the verdict and grant a new trial. That obligation, however, is the result of a conclusion of fact, and in such cases the ground of the ruling is, that the verdict is not supported by sufficient evidence, because it is against the weight of the evidence. Therefore it was said by this court in *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478: "It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant." In many cases, therefore, the evidence is insufficient in law, because insufficient in fact.

The sections of the Revised Statutes relating to the District of Columbia under consideration, it is admitted, were taken substantially from the New York Code of Procedure of 1851–1852; and it is admitted, also, that, by the construction placed upon the language contained in § 804 by the courts of New York, it includes motions to set aside a verdict against the weight of evidence, as within the phrase "for insufficient evidence." This was the very point determined in the case just referred to, of *Algeo* v. *Duncan*, 39 N. Y. 313, and in *McDonald* v. *Walter*, 40 N. Y. 551. The Supreme Court of the District of Columbia, however, in *Stewart* v. *Elliott*, *ubi supra*,

declined to follow these decisions of the New York courts, because they construed the code of procedure of that state so as to conform to the previous well established practice in that state; and it was held that in the District of Columbia the case was widely different, because prior to the adoption of these provisions in the act of Congress the well established practice in the District of Columbia was that which had always been in force in the state of Maryland. The argument was that in that state the granting or refusal of a motion for a new trial was a matter resting in the discretion of the court, and could not be ground for a writ of error or appeal; and that, consistently with that previous practice, §§ 804 and 805 must be construed strictly so as to limit the appeal originating in them to the cases particularly mentioned.

The language of the court in *Stewart* v. *Elliott*, *ubi supra*, on this point is: "This well settled practice, existing here when the act of March 3, 1863, was passed, should only be considered as changed by that act to the extent clearly indicated by its terms; and no latitude of construction can be allowed in the interpretation of a statute framed in derogation of common law principles. As was said by the court in the case in 24 Howard," (Pr. Rep. 211, *Algeo* v. *Duncan*, before referred to,) "it is a safe rule to apply the former practice and interpret the obscurities and deficiencies of the code by the light of that practice."

But the act of March 3, 1863, "to reorganize the courts in the District of Columbia and for other purposes," 12 Stat. 762, was the introduction into the District of Columbia of a new organization of its judicial system. It established a single court, to be called the Supreme Court of the District of Columbia, having general jurisdiction in law and equity. It gave to that court the same jurisdiction as was then possessed and exercised by the Circuit Court of the District of Columbia, and to the justices of the new court the powers and jurisdiction of the judges of the Circuit Court. It also gave to each of the justices of the court power to hold a District Court of the United States for the District of Columbia, with all the powers and jurisdiction of other District

Courts of the United States; and also to hold a Criminal Court for the trial of all crimes and offences arising within the District, with the same powers and jurisdiction as was then possessed and exercised by the Criminal Court of the District of Columbia. All the courts, therefore, previously existing in the District of Columbia, as separate and independent tribunals, having special and diverse jurisdictions, were consolidated into the new Supreme Court of the District of Columbia. The arrangement of that court, for purposes of convenience and despatch of business, into general and special terms, was taken from the system long previously established and known in the state of New York in reference to its Supreme Court; and, for the purpose of determining the relation of the special to the general term, the act of Congress of March 3, 1863, adopted the provisions from the legislation of New York incorporated into the sections of the Revised Statutes now under consideration.

Instead of construing these new statutory provisions in the light of the jurisprudence of Maryland previously prevailing in the District in reference to this subject, we think that when Congress reorganized the judicial system of the District, by abolishing the old courts and by establishing the present Supreme Court of the District, with its general and special terms, and adopted them from the legislation of New York in substantially the same language, these provisions are to be construed in the sense in which they were understood at the time in that system from which they were taken. In other words, we think that Congress adopted for this purpose the law of New York as it was understood in New York. *McDonald* v. *Hovey*, 110 U. S. 619.

It follows, therefore, that the previous practice of the courts of Maryland, and the decisions of the Supreme Court of the United States in reference to writs of error to and appeals from the former Circuit Court of this District, are not entitled to the weight which was given to them by the Supreme Court of the District of Columbia in *Stewart* v. *Elliott*, *ubi supra*, and in their judgment in this case. It is true that motions to grant a new trial, upon the ground that the verdict is against

the weight of the evidence, are, in a certain sense, addressed to the discretion of the court, and can be more satisfactorily dealt with by the judge who tried the cause and who had the opportunity of seeing the witnesses and hearing them testify. And this furnishes one of the reasons why ordinarily a writ of error or an appeal will not lie for the purpose of revising and controlling the exercise of that discretion by an appellate tribunal; yet in some of the states a contrary practice prevails, and a writ of error is authorized to bring up for review the proceedings and judgment of an inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below erred in not granting a new trial because the verdict was against the weight of the evidence. Such a practice in the appellate courts of the United States is perhaps forbidden by the Seventh Amendment to the Constitution of the United States, declaring that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." But that rule is not applicable as between the special and general terms of the Supreme Court of the District of Columbia as now organized. The appeal from the special to the general term is not an appeal from one court to another, but is simply a step in the progress of the cause during its pendency in the same court. The Supreme Court sitting at special term and the Supreme Court sitting in the general term, though the judges may differ, is the same tribunal. It is quite true, nevertheless, that the judge sitting at special term on the trial of a cause by a jury, is, from the nature of the case, better qualified, because he sees the witnesses and hears them testify, to judge whether the verdict is warranted by the evidence, than other judges, even of the same court, who are called in to decide the same question upon a report of the testimony in writing; and where the question comes up in general term, on an appeal, all proper allowance will be made, in its consideration, for that difference, and its due weight given to the order of the judge at special term denying the motion.

The difficulty in the way of a satisfactory judgment on the

appeal is, therefore, not to be considered as insuperable; in fact, it applies equally to the case of motions for a new trial based on the ground that the damages allowed by the verdict are excessive, which presents purely a question of fact, not determinable by any fixed and certain rule of law. It will apply also in many cases where the ground of the motion is that the verdict is not sustained by evidence sufficient in law, for in one aspect that may involve questions of fact. That would be a proper form of motion in cases where, although there is some testimony to support the conclusion, it is so slight that the judge trying the case would be legally justified in instructing the jury to return a verdict the other way; and although in such cases it is said to be a question of law, it nevertheless involves an estimate on the part of the court of the force and efficacy of the evidence.

It is our opinion, therefore, that the Supreme Court of the District at general term erred in dismissing the appeal from the order at special term denying the motion for a new trial on the ground that the verdict was against the weight of evidence. It should have entertained and considered the appeal on that ground.

It is urged in argument, however, that the error did not prejudice the plaintiff in error, because the court necessarily passed upon the same matter in considering and sustaining the ruling of the court at special term in refusing to instruct the jury to return a verdict in favor of the defendant upon the evidence offered by the plaintiff; but the question arising on this ruling, and that on the motion for a new trial at the conclusion of the whole evidence, were not identical. It might well be that on the plaintiff's evidence there was a case sufficiently made out to submit to the jury, while on the whole testimony it might fairly be a question whether the verdict was not against the weight of the evidence, in that sense which would justify the court in granting a new trial. Of course, nothing we have said in this opinion is to be construed as indicating any rule of decision in such cases, or is intended in the least to narrow the province of the jury as the proper tribunal for determining questions of fact in

trials at common law. The relation of the court to the jury, together constituting the appointed tribunal for the administration of the law in such cases, is regulated by fixed and settled maxims. The legal discretion of the Supreme Court of the District, whether sitting at general or special term, in granting or denying motions to set aside verdicts and grant new trials, is not by law submitted to the review of this court. The only point in judgment here is that the plaintiff in error was entitled by law to have that discretion exercised by the Supreme Court at general term, and that that court committed an error of law in refusing to consider his appeal from the order at special term denying his motion for a new trial, based on the ground that the verdict was against the weight of the evidence.

For this error, the judgment of the Supreme Court of the District of Columbia at General Term is reversed, and the cause remanded, with directions to take further proceedings therein in conformity with this opinion.

McGOWAN *v.* AMERICAN PRESSED TAN BARK COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

Argued March 25, 28, 1887. — Decided May 2, 1887.

In this case, the question being whether a contract was made by the defendants as copartners, or for a corporation, it was held that the instructions to the jury on the subject were proper.

Where, by a contract, the defendants were to erect machinery on a steamboat in 60 days from the date of the contract, and the plaintiff did not furnish the steamboat until after the expiration of the 60 days, and the defendants then went on to do the work, they were bound to do it in 60 days from the time the boat was finished.

A supplemental contract between the parties construed, as to its bearing on the original contract sued on.

A counterclaim or recoupment must be set up in the answer, to be available.

An objection to the competency of an expert witness to testify, overruled.

Opinion of the Court.

THIS was an action at law to recover damages for non-performance of a contract. Verdict for the plaintiff and judgment on the verdict. Defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. George Hoadly and *Mr. T. D. Lincoln* for plaintiffs in error.

Mr. Edgar M. Johnson, *Mr. Edward Colston*, *Mr. George Hoadly, Jr.*, *Mr. C. H. Stephens* and *Mr. J. L. Lincoln* were also on the briefs.

Mr. Thomas McDougall and *Mr. E. W. Kittredge* for defendant in error.

MR. JUSTICE BLATCHFORD delivered the opinion of the court.

This is an action at law brought in the Circuit Court of the United States for the Southern District of Ohio, by the American Pressed Tan Bark Company, a New Jersey corporation, against Theodore J. McGowan and Robert C. Bliss, partners under the firm name of "The McGowan Pump Company," doing business at Cincinnati, Ohio, to recover damages for the alleged breach by the defendants of a contract for the construction and erection of machinery upon a steamboat. The petition by which the action was commenced sets forth a contract entered into on the 23d of June, 1881. After a trial before a jury, which occupied thirty days, there was a verdict for the plaintiff for $18,000, and a judgment accordingly, to review which the defendants have brought a writ of error.

The petition alleges that the plaintiff, being the owner of patents for the manufacture and sale of pressed tan bark, entered into a contract with one Mack, of Cincinnati, for the construction of a steamboat which was to receive, carry and operate machinery to be erected on it by the defendants under the contract sued upon, and was to be constructed, by agreement with the defendants, under their control and supervision, and to their acceptance; and that the boat was so constructed by Mack and was accepted by the defendants. The contract

between the plaintiff and Mack for the construction of the boat was in writing, and was made on the 17th of June, 1881. It contained the particulars as to the size and material and mode of construction of the boat, and stated that its construction and acceptance, on the part of the plaintiff, was left with "Theo. J. McGowan & Bliss," and that it was to be finished and delivered, afloat, to the plaintiff, on or before August 26, 1881. The petition alleges that this contract with Mack was made with full knowledge on the part of the defendants of the purpose for which the boat was being constructed, and with their direction, counsel and advice.

The written papers constituting the contract between the plaintiff and the defendants were as follows: On the 23d of April, 1881, the defendants, using the signature "Theo. J. McGowan & Bliss," wrote from Cincinnati to A. G. Darwin, the president of the plaintiff, the following letter:

"CIN'TI, O., *April* 23, 1881.

"A. G. Darwin:

"DEAR SIR: We herewith submit plan for bark press, two views, one plan and the other elevation. They were gotten up in great haste and are not as full as they should be, but they show what our ideas are. The operation is 2 12 hyd. presses, E E, one on each side of 20″ hyd. press D, to remove the bark from containing cyl. G, alternately, after being pressed in 20″ hyd. press D. They pass from the hyd. press E to hyd. press D, by a track, and are filled at top end from floor above, and the bale is also delivered from top end of containing cyl. on to the floor from which cylinders are filled. F is a chamber 40″ in diameter and 12 feet high, and is supplied with water and air by steam pump A, which keeps up a pressure in F to 300 lbs., to operate the hyd. presses rapid at beginning of the operation, and, when the hyd. pumps B and C have raised the pressure in hyd. press beyond 300 lbs., the check-valves close, and shut off connection between hyd. presses and pressure chamber. Then the hyd. pumps B and C complete the pressure until bale is pressed in 20″ press and bale removed from containing cyl. The hyd. pump C is used exclusively for

20″ hyd. press, and hyd. pump B is used for the two 12″ presses E E. The hyd. pumps are independent of each other, and each has its own steam cyl. The steam pumps use the water over again from tank from which it has been delivered from hyd. presses. The operation is about as follows: The containing cyl. is filled from upper floor, is run under 20″ press and pressed up to desired pressure; it is then run on track to 12″ press, where it is forced from containing cyl., which is again filled and operation repeated, and, while cyl. is being emptied the other is going through 20″ press, and so on; work is done very rapidly and well. 20″ press can be used up to 1500 tons pressure.

"Trusting this hurried explanation is satisfactory and that we may have your favors,

"Yours, &c.,

"Theo. J. McGowan & Bliss.

"P. S. — Time required for each pressing and delivery of bale 2½ minutes. We guarantee the whole."

On the 20th of May, 1881, the following letter, signed "The McGowan Pump Co.," was written to Darwin:

"Cincinnati, O., *May* 20, 1881.

"A. G. D., Chicago:

"Yours 18th to hand, and contents noted. By enlarging press, as per your suggestion (which we think very good), we are of opinion that we have large surplus power in presses, and almost agree with you in your ideas as to amount, but we are inexperienced with the nature of tan bark to press into a cylinder and remove therefrom, and have been governed entirely by the calculations given us by Mr. Hill, and we think there will have to be some little experimenting before you can accomplish just what you want. We do not know how much compression there will be to make bale and weight required, nor how bulky the bark will be, when loose, to make bale of required size. We do know the motions can be made in 2½ minutes and the pressure 1500 tons given, but what kind of

bale it will be we do not know. We are constructing this machinery to make these bales 14″ x 16″, and not much clearance. We think it would be advisable to have more clearance made, by extending columns further out, to permit a large bale being made, by enlarging cylinder, as you suggest. This would necessarily make the press cost more money. The bars would have to be extended further out and the castings made heavier to resist pressure. If you come to the conclusion to have enlargement made, notify us at the earliest moment possible. We have now got scale drawings about complete, and, when the boat is procured, or other selection made for erection, we will have to add to our plan the supports for the support of presses to foundations. It will materially change our plans if changed from boat to land, as presses are very long, and on a shallow boat would throw them above main deck. Will be glad to see you.

"The McGowan Pump Co."

On the 23d of June, 1881, the following written contract was executed:

"Cincinnati, O., *June* 23, 1881.

"The Am'r. Pressed Tan Bark Co., of 240 Broadway, N. Y.

"Gentlemen: We hereby propose to furnish you the following machinery:

"1. 14″ x 24″ engine and all necessary trimmings for grinding bark.

"2. 14″ x 28″ engine and all necessary trimmings for propelling boat.

"3. 3 boilers, 42″ x 26″, and all necessary trimmings for propelling boat.

"3 bark mills and all necessary trimmings and gearing.

"1 bark elevator; 2 elevators with platforms, for raising and lowering pressed bark to and from hold of boats, to be provided with safety catches and unwinding device; 3 heaters — 1 for bark engines, 1 for boat engines, and 1 for steam-pumps; 1 steam-pump for boiler feed; 1 deck hand-pump; 250 feet of rubber hose, couplings, and 3 nozzles; 2 hoppers and scales to

weigh bark; all the necessary shafting, hangers, pulleys, beltings, and all steam and escape pipes; also one 20″ hyd. press and two 12″ hyd. presses, with their necessary fixtures and connections, together with the necessary hyd. steam-pumps, tank, &c., for pressing bark into bales; all to be done in a workmanlike manner and of first-class material, and set up aboard your boat in Cincinnati, Ohio, for the sum of twenty-three thousand seven hundred ($23,700.00) dollars; the above machinery to have a sufficient capacity to do the required work, and guaranteed to pass government inspection.

"The McGowan Pump Co.

"To be completed in 60 days.

"We accept the above.

"Accepted June 23, 1881.

"Am'r. Tan Bark Co.,
"By S. H. Beach, Att'y."

On the 30th of June, 1881, the following letter was written by Darwin to "The McGowan Pump Co.:"

"New York, *June* 30, 1881.

"To the McGowan Pump Co., Cin'ti, Ohio.

"Mr. S. H. Beach hands us contract for presses, engines, boilers, &c., &c., entirely satisfactory, as we understand — that is, that the capacity of the presses, &c., are in keeping with guarantee expressed in your letter of April 23, 1881, which we consider a part of your contract, in so far as guarantee of the presses are concerned. Please give us formal acknowledgment of same.

"Yours respectfully, A. G. Darwin,
"Pres't A. P. T. B. Co."

On the 5th of July, 1881, the following letter was written by "The McGowan Pump Co." to Darwin:

"Cincinnati, Ohio, *July* 5, 1881.

"A. G. Darwin, N. Y.

"Dear Sir: Your favor of June 30th to hand and noted. Our contract is in accord with ours of April 23. Of course

we do not know nor could we guarantee anything in reference to whether the bark will bale or not, or weight or size of bale. That we consider an experiment, and can only be demonstrated by test.

"Yours respectfully, THE McGOWAN PUMP CO."

At the trial, the plaintiff offered evidence, in connection with the contract with Mack, tending to prove that that contract was drawn up in the office of the defendants, and read over by the parties before it was signed, in the presence of the defendants, and was left in their safe until some time in November, 1881, when the boat was launched by Mack; and evidence tending to show that the defendants agreed to superintend the erection and construction of the boat, and took upon themselves the supervision and control of the same, and undertook to accept the same, for the plaintiff; that the boat was constructed for the purpose of receiving and operating the machinery of the defendants, according to plans of construction discussed between the agents of the plaintiff, and Mack, and the defendants, and approved by the defendants; and that the defendants did superintend the construction of the boat and accept the same.

The petition alleges, that the contract of the 23d of June, 1881, was a contract whereby the defendants agreed and guaranteed to construct, erect, complete and have in operation on board of the boat, within sixty days from the date of the contract, the machinery specified in it, for the purpose of pressing tan bark under the patented process, and according to plans, specifications and details furnished by the defendants; and that the defendants guaranteed that all of the machinery should be done in a workmanlike manner and of first-class material, and set up on board of the boat at Cincinnati, and that all of said machinery should have sufficient capacity to do, and would do, the required work, and would pass government inspection, and that the hydraulic machinery would sustain and work up to a pressure of 1500 tons, and that the time necessary for pressing and delivering each bale of bark would be two and one half minutes.

The breach alleged in the petition is, that the defendants have failed to construct, erect and complete the machinery according to the contract, and have failed to erect and complete it within the time set forth in the contract; that the machinery constructed and erected on board of the boat by the defendants is of insufficient and inferior material, is inferior and defective in character and quality of workmanship and fails to do the work required by the contract; and that the hydraulic machinery constructed will not give, sustain or work up to the 1500 tons pressure as guaranteed by the defendants, and is defective in workmanship and unsafe. The petition further alleges, that the plaintiff has wholly performed on its part the contract of the 23d of June, 1881, and paid to the defendants, on account of the $23,700 to be paid thereby, the following sums, at the following dates: November 5, 1881, $4500; November 26, 1881, $2500; January 24, 1882, $3000; February 28, 1882, $2500; and March 30, 1882, $4000; making a total of $16,500.

The defendants put in an answer, denying generally the averments of the petition, on which the case went to trial. On the third day of the trial, by leave of the court, the defendants filed an amendment to their answer, in the following language:

"Second defence. These defendants, protesting that the contract dated June 23, 1881, described in the petition, was not made with them, but with the McGowan Pump Company, a corporation of Ohio, say, that if it shall appear, upon the trial of this cause, that the contract was made with them as partners, under the name of the McGowan Pump Company, and not with said corporation, then they say that said contract, as made June 23, 1881, did not provide, as a part of said contract, that the hydraulic machinery would sustain and work up to a pressure of fifteen hundred tons, or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, as alleged in said petition. The defendants say that said contract, as originally executed, contained neither of said provisions, and that, if it shall appear that, by a subsequent modification of said contract, such

provisions were added to and became a part of said contract, then they say that the same were wholly without consideration.

"Thirdly. And for a further defence in this behalf, these defendants, protesting that the contract, dated June 23, 1881, described in the petition, was made with the McGowan Pump Company, a corporation of Ohio, say, that if it shall appear, upon the trial of this cause, that it was made with them as partners, under the name of the McGowan Pump Company, then, that on and before the 30th day of March, 1882, extra work, not required by said contract, to the amount of fifteen hundred and eighty-two dollars and fifty-one cents, had been furnished to the said American Tan Bark Company, being the same extras described in the contract hereinafter copied, and that, in consideration of the transfer to the American Pressed Tan Bark Company of all the machinery embodied in the said contract of June 23, 1881, and said extras, with receipts in full for all material and machinery furnished T. G. McGowan and Bliss by other parties for steamer Tan Bark, the said contract of June 23, 1881, has been wholly released and discharged, and other terms of agreement substituted therefor, by reason of the fact, that, on the 30th day of March, 1882, a contract was executed and delivered by and between the parties to the contract of June 23, 1881, viz., the McGowan Pump Company and the American Pressed Tan Bark Company, and which contract of March 30, 1882, if it shall turn out that it was made by the defendants as a partnership, under the name of the McGowan Pump Company, was made and delivered for the benefit of the same McGowan Pump Company which executed the contract of June 23, 1881, which contract is still in full force and binding between the parties, and is in the words and figures following, to wit:

'CINCINNATI, O., *March* 30, 1882.

'In consideration of 11,200 dollars to be paid us we hereby transfer to the American Pressed Tan Bark Company of New York all the machinery embodied in our contract, and extras, with receipts in full for all material and mach'y furnished

T. J. McGowan & Bliss by other parties for steamer Tan Bark. The terms of this sale are as follows: To continue all former agreements and guaranties except time required to press bark into bales and removal from cylinders. We further agree to transfer to said Co. all special patterns made for our hyd. machinery, and also agree to transfer to said Co. our exclusive interest in the accumulator and double-end arrangement on hyd. press for bark purposes only. It is hereby agreed, that the above guaranty, covering hyd. mach'y, extends only to the strength of material only up to the fifteen hundred tons pressure. We hereby acknowledge receipt of four thousand dollars; balance to be paid on presentation of receipts, as above.

'All erasures and changes made before signing.

'The McGowan Pump Co.

'American Pressed Tan Bark Co.,

'By S. H. Beach, Attorney.'

"And the defendants further say, that the four thousand dollars described in the petition as paid on the 30th day of March, 1882, was paid to the said McGowan Pump Company under and in pursuance of the said contract of March 30, 1882, at the date of its execution, and is the same sum therein named and receipted for, but that no further or other payments have been made under said contract, although the same has been wholly complied with by the said McGowan Pump Company.

"Fourthly. And by way of a fourth defence in this cause, the defendants, protesting that the said contract of June 23, 1881, was made by the McGowan Pump Company, a corporation of Ohio, and not with the defendants as partners under the name of the McGowan Pump Company, nevertheless, if it shall prove, upon the trial of this cause, that it was made with them in such partnership capacity, by way of further defence, say, that in the month of March, 1882, the defendants took possession of and accepted the machinery constructed upon the said steamer Tan Bark, as and for full performance of said contract, and waived any claim for further performance thereof, and have prevented the defendants from

making further performance thereof, if such were necessary, which the defendants deny, by taking the same into their exclusive custody and possession, and have made divers and sundry changes in said machinery themselves, so as to prevent and render impossible any further performance thereof, if any such were necessary under said contract, and have employed the McGowan Pump Company of Cincinnati, Ohio, being the same company which entered into the contract of June 23, 1881, described in the petition, to do work to be used in making other changes and alterations, which last-named work done by the McGowan Pump Company, and which, if said company turn out to have been a partnership, was done by the defendants as such partnership, amounts to the sums of $1384.96 and $146.50, for which an action is now pending against the said plaintiff on behalf of the said McGowan Pump Company, as aforesaid; and said defendants have removed said steamer Tan Bark, and all said machinery so altered, from the jurisdiction of this court and into the state of Tennessee, where the same now is, and have appropriated the same to their own use."

The plaintiff put in a reply to this amended answer. In regard to the second defence, the reply denies that the provisions of the contract, that the hydraulic machinery would sustain and work up to a pressure of 1500 tons, or that the time necessary for pressing and delivering each bale of bark would be two and a half minutes, were without consideration, and denies the other allegations of the second defence. As to the third defence, it alleges that the instrument of the 30th of March, 1882, was executed by it on the faith of representations made to it by the defendants that they had operated and tested the hydraulic machinery up to a pressure of 1000 tons, and that the bales of bark pressed by them on the trial of the machinery made by them on the 27th of March, 1882, had received a pressure of 1000 tons therefrom, and that the machinery as so constructed had been operated by the defendants under said pressure of 1000 tons; that those representations were untrue; that, had the plaintiff known that fact, it would not have executed the instrument; that, on discovering

the untruth of the representations, it immediately notified the defendants that the agreement set forth in the instrument was null and void; that the same was thereupon abandoned by the parties thereto; and that the hydraulic machinery never has worked, and never will work, up to a pressure of 1500 tons, and wholly fails to comply with the agreements and guarantees made by the defendants. It denies the other allegations of the third defence. As to the fourth defence, it avers that, after the defendants refused to do any further work on the machinery, it made, at heavy expense, alterations in it to make it operative.

The bill of exceptions states, that the plaintiff gave evidence "tending to prove that the defendants were partners under, and signed, the name of T. J. McGowan & Bliss and the McGowan Pump Company, and tending to show that, at the time the contract of June 23 was signed, the defendants, upon being asked the reason for using the name of the McGowan Pump Company, said it was to retain the old name;" also, that the plaintiff gave evidence "tending to show defendants had negotiated with plaintiff as a firm, under the name of the McGowan Pump Company, prior to June 23, 1881, and that the defendants contracted with the plaintiff June 23, 1881, as a firm, under the name of The McGowan Pump Company, and that all the plaintiff's dealings with the defendants were as such partnership;" and evidence tending to show that the plaintiff was a corporation duly organized under the laws of New Jersey, and owned valuable patents for the grinding and pressing of tan bark, which it expected to utilize in this machinery and the use thereof; and evidence tending to show "that the machinery named in the said contract of June 23, 1881, was not completely finished and put upon the said boat within the sixty days named in said contract, nor for a long time thereafter, and that, when completed, it was of insufficient material, and not of sufficient power or strength to press a bale of tan bark with a pressure of fifteen hundred tons in two and one half minutes, nor within any time; that the entire machinery was wholly insufficient to accomplish the purpose for which it was constructed, and was

very rough, and was made in an unworkmanlike manner; that, in consequence thereof, it suffered great delay in the use of the said boat and machinery, and great damage in having to expend a large sum of money upon the same; and that it lost a very large sum of money by the breach of the said contract before it was finished, and after that, because of the insufficiency of the said machinery and its defective character."

The contract of March 30, 1882, was in the words set forth in the third defence in the amendment to the answer. The plaintiff gave evidence tending to show that it had, prior to the 30th of March, 1882, paid to the defendants, on account of the machinery and work, $12,500, that a few days after signing the last-named contract, it paid the $4000 named therein, that no machinery had been put in the boat on the 10th of November, 1881, and that there was nothing ready on the boat by December 5, 1881; and evidence tending to show that, after it took possession of the boat and machinery, it made additions thereto, costing some $1200, a part of which the defendants did for it under a written contract of the 19th of April, 1882, mentioned hereafter.

The bill of exceptions also contains the following statements: "The plaintiff offered evidence of experts tending to show that the machinery and material of which it was constructed were poor and insufficient to sustain the required pressure; and, upon cross-examination upon this point, the said witnesses gave evidence tending to show that a single hydraulic cylinder could not be made of cast iron so as to bear 1500 tons pressure; that the water would permeate and pass through the iron, and, upon examination by the court, evidence tending to prove that it was not practicable to get such pressure with one cylinder of the kind, but that it might be done with three cylinders, of a pressure of 500 tons each upon one platen: and, on further cross-examination, they gave evidence tending to show that water would force itself through cast iron at 700 tons pressure, that cast iron is not safe for more than 600 tons. And the plaintiff gave evidence tending to show that the machinery was only of the value of scrap. The plaintiff also gave evidence tending to show that, at and

before the contract of March 30, 1882, was entered into, McGowan had stated that he had had a pressure, on previous tests, of 800 to 1000 tons on the machinery in pressing bark, and that said representations were false, and that plaintiff was thereby induced to enter into said agreement. Plaintiff gave evidence tending to show that the defendants had tested the machinery, and it was found defective, on the 27th of March, 1882, before the execution of the contract of March 30; and defendants gave evidence tending to show the contrary, and that they made no false representations, and that plaintiff knew, from its employes present at the test, what pressure it bore at the time, and reported to the plaintiff that it had never borne a pressure of over 400 tons, and that there was no more on it at that time. They gave evidence tending to show that McGowan claimed that the failure of the machinery was caused by the insufficient foundations of the boat, because the machinery was not adapted to the boat; that they had done all that was practicable, under the condition of the boat upon which the machinery was to be placed. But the plaintiff gave evidence tending, on the contrary, to show that it was practicable to construct such machinery of cast iron and place it upon said boat." "The defendants offered evidence tending to show that any such boat with machinery upon it had never before been known and used; that it had in no way been tested; and that it was an experiment. They also offered evidence tending to show that the plaintiff had possession of the said boat immediately after she came off the ways, on or about the 1st of November, 1881, and received the boat from Mack, and that it had witnessed experiments of pressing bark made with the machinery in January, February, and March, 1882, and was familiar with the condition, strength and workmanship of the same, before entering into the contract of March 30, 1882, and had knowledge before that of the amount of pressure which the defendants had used thereon." "The defendants offered evidence tending to show that they were not boat-builders, had no knowledge of boats or of boat-building, as the plaintiff knew, and that defendants refused to take any responsibility about the boat, and had nothing to do with

planning, constructing, supervising, accepting, or controlling it or its foundations; that they supposed Mr. Mack would attend to that; that the boat was not launched or presented for the machinery until November, 1881; that they supposed, when they commenced to put the machinery upon it, that it would be sufficiently strong; that the foundations, as they proceeded, proved wholly insufficient for that purpose, being too weak; that they reported it to the plaintiff's agent; that he said to them to go ahead and put it on and he would guarantee that they would stand; that the defects in the boat and the bad management of the machinery by the plaintiff caused all the difficulty and breakage in the machinery, and all the expense in repairing; and, in addition thereto, the defendants also offered proof tending to show that the boat was not ready for their work until about the 10th of November, 1881, and that they used due diligence in the manufacture of the machinery and in putting it upon the boat, and that the delay therein was due to the delay in finishing the boat and in the character of the boat when presented for the machinery to be put upon the same. They also offered proof tending to show that the material of which the said machinery was constructed was of sufficient strength to work 1500 tons and more. They also offered proof tending to show that, in March and April, 1882, the plaintiff took possession and control of said machinery, and that it was built and set up on its boat by the defendants under the contract of June 23, 1881, and afterwards, to make it more perfect, effectual, and useful, entered into the contract of April 19, 1882, with the defendants, and the defendants furnished the labor and the material provided for in said contract, and that the plaintiff used it on their said boat. The defendants also gave evidence tending to show that the machinery for pressing the bark was constructed of the very best cast iron, and that that was the only material of which said machinery is ever constructed; that the same was of the very highest and best character, and that the workmen upon it and the workmanship were of the highest and best character, and that they endeavored in every way they could to make this machinery as strong and as well as it could be

made. They also offered evidence tending to show that, after the boat was launched and ready for the machinery, they proceeded to put the machinery upon the boat, and thereafter they worked with due diligence in putting the same upon the said boat. The defendants also offered proof tending to show that they had fulfilled their contract and were not liable for any damage to the plaintiff, but, on the contrary, the plaintiff owed them for said work, and under the agreement of March 30, 1882, the sum of $8731.46. The defendants also offered evidence tending to show that they never examined Mack's contract, and that there was nothing said about the character of the foundations of such machinery; that they supposed that, Mack being a boat-builder, he knew what foundations for the machinery would be necessary. They also gave evidence tending to show that the McGowan Pump Company was a corporation at the time of entering into the contract of June 23, 1881, and was so acting in making the contract, and that the plaintiff was so informed of it before the signing of the contract." "They also offered evidence tending to show that the boat was not constructed to carry freight or passengers, and the propelling machinery was to be plain, unornamented machinery, to propel the boat from landing to landing at a rate of from two to two and a half miles per hour, and that, on her trip to Paducah and her trial trip up stream, she did more than that."

"All the letters of defendants, copies of which are attached in the exhibits, had the following letter-head printed on them:

'Established 1862.

'Theo. J. McGowan, R. C. Bliss.

'Senior partner of late McGowan Bros.

'Manufacturers of railroad water station supplies, water columns, tank valves, steam and power pumps, wrought and cast iron pipe, &c.

'Office of the McGowan Pump Co.,

'Nos. 141 and 143 West Second Street,

'Cincinnati, ——, 188–.'

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being the printed letter-head that was in use prior to June 20, 1881, except" the letter of April 23, 1881, which had the same letter-head, omitting the word "The" before "McGowan Pump Co.," and a letter dated May 8, 1881, signed "The McGowan Pump Company," and addressed to Darwin. The bill of exceptions does not purport to set forth all the evidence that was given at the trial.

After the verdict and before judgment, the defendants moved for a new trial, and, in case it should not be granted, then in arrest of judgment, and, in case neither of such motions was granted, then to restrain the issuing of execution in this case to the amount which should remain after making the deduction of the amount sued for in the suit mentioned in the fourth defence in the amendment to the answer. These motions were denied, and the defendants excepted.

The first error assigned relates to the question whether the contract of June 23, 1881, was made by the defendants as copartners, or was made by a corporation called "The McGowan Pump Company." If by the latter, the action must fail.

The court, under exceptions by the defendants, gave the following instructions to the jury:

"1. If the jury find, from the evidence, that defendants, prior to the making of the contract of June 23, 1881, held themselves out to plaintiff as partners, and that plaintiff dealt with them as such prior to the making of said contract, and entered into said contract believing them to be a firm, and without notice of a corporation, then said defendants are liable on said contract, even though they should find that defendants were not, in fact, a firm, and that there was a corporation called 'The McGowan Pump Company.'

"2. If the jury find, from the evidence, that the defendants were, prior to June 23, 1881, doing business as partners under the name of 'The McGowan Pump Company' or 'McGowan Pump Co.,' and that plaintiff dealt with them before said date as such partners, and had no knowledge of any change in said business, then said contract is the contract of defendants, and defendants cannot avoid or escape liability thereon, even if on

that date a corporation existed called 'The McGowan Pump Company,' with which defendants may have been connected, and to which they had turned over their entire partnership business and assets."

The court also charged the jury as follows on the question of partnership, no part of which charge was excepted to by the defendants:

"The plaintiff has sued the defendants as partners, and can recover against them only as individuals, jointly, equally, and severally liable upon their contract. The two defendants, McGowan and Bliss, undeniably negotiated and executed the contract, but whether as individuals or as the representatives and agents of a corporation is the question you are to determine. On the facts of this case, which are not disputed, the law charges them as partners, in their liability on the contract with the plaintiff, unless they have established by proof that they were, in making the contract, only the agents of a corporation, and disclosed their agency to the plaintiff, or that this in fact was otherwise known to the plaintiff. It is wholly immaterial, if they were in fact partners, or held themselves out to the plaintiff as partners, which is precisely the same thing as if they were partners in fact, by what name they did their business or made this contract; whether they were known or contracted as 'Theodore J. McGowan & Bliss,' as 'McGowan Pump Company,' or as 'The McGowan Pump Company,' or whether they used any or all of these names indifferently or interchangeably. Now, if they held themselves out to the plaintiff as partners, it is unimportant whether they were a corporation or not in fact. Your inquiries are, 1st. Were they partners in fact in making this contract? If so, they would be liable as partners. 2d. Did they hold themselves out to the plaintiff as partners? If so, they would be liable in that relation. 3d. Were they in fact the authorized agents or representatives of a corporation competent to contract as a corporation, or did they assume to be so authorized, and in that representative capacity make this contract? If so, they cannot be held as partners, provided they disclosed their agency to the agents acting about this business for the plaintiff corporation,

namely Darwin, Beach, or Hill, or any of them, or if these agents of the plaintiff corporation otherwise knew that fact. If the jury find that, on the 23d of June, 1881, there was in existence a corporation called 'The McGowan Pump Company,' qualified to do business, when the contract of that date was signed in that name, and that the defendants were authorized to act for it, and informed Beach that it was that corporation making the contract, the verdict must be for the defendants, because the corporation is not here sued. And, in ascertaining whether the corporation existed in fact, if you find that the entire amount of capital stock of 'The McGowan Pump Company' was subscribed, and the subscribers met and elected directors, and the directors elected Theodore J. McGowan president, and Robert C. Bliss secretary, and said president and secretary made the contract of June 23, 1881, in the name of 'The McGowan Pump Company,' and informed the agent of the plaintiff at the time that 'The McGowan Pump Company' was a corporation, and was contracting in that capacity, then the defendants are entitled to a verdict, notwithstanding it may appear to the jury that the subscribers to the articles of incorporation failed to certify to the secretary of state, as required by law, that said subscription of stock had been made. But, as a corporation in Ohio can only act by or under the authority of its board of directors, and on the 23d June, 1881, there is no evidence tending to show any action of the board of the corporation known as the McGowan Pump Company authorizing the contract in this case to be made, and authorizing either McGowan or Bliss to contract for the corporation, you should consider the fact that they had no such authority, on that date, to make a contract for the corporation, in determining whether they did in fact undertake to contract for the corporation, and whether the signature to said contract was the signature of the corporation or of the defendants as partners. But while you should give this fact its due weight, also the fact that the final organization sought to be proved was only a few days prior to the contract, together with all the other facts relating to the formation of the corporation, it is proper to say that, in the opinion of

the court, the want of direct authority conferred by a board of directors would not, in this controversy, so affect the contract as to convert it into one of partnership, because that is a question between the corporation and its officers assuming to act for it; wherefore, if you find that, notwithstanding this want of authority, the defendants assumed, in their corporate capacity, to contract with the plaintiff, and notified Beach that they were so assuming to act, or he otherwise knew it, your verdict must be for the defendants, irrespective of any want of authority. This point of notifying Beach is one of direct conflict of testimony between the parties, which you must settle under the rules to be hereafter mentioned, the court being content to say here that it is a matter in this lawsuit of paramount importance to both parties, which demands your most careful consideration. In determining these questions submitted to you on this branch of the case you may look to all the facts in proof having any bearing on the questions." "I invite your attention to certain features of the evidence on this branch of the case. From the origin of the transaction in controversy in this case, found in Darwin's letter of March 12, 1881, and even prior to that time, as shown by the defendants' dealings with him as president of another company, it is undisputed that the defendants dealt, in the negotiations with the plaintiff's agent, as partners, no matter under what name, until, at the very earliest, about the 20th May, when the alleged transfer of assets to the corporation is said to have taken place; and it may be you will find, in the disputed facts, that they so dealt down to about June 20, 1881, when the minutes of corporate organization, in proof, show that a more complete organization was attempted or perfected. The exact status of this corporation between these dates might be under some circumstances a matter of grave importance, as to which it would be the duty of the court to instruct you more fully. But here the court has, in the instructions already given, indicated the greatest influence it can have on this issue between the parties. Perhaps a fuller explanation of the legal effect of the proof about the status of this corporation may aid you. It cannot be denied that the defendants were part-

ners from the date of their partnership articles to the dissolution of the partnership by the substitution of a corporation; nor can it be denied that, as early as 1880, more than a year before this transaction began, the defendants took the primary step to organize a corporation, but nothing more until May or June, 1881, a short time before this contract was made; but it is equally undeniable that they negotiated and dealt with plaintiff as partners, necessarily so, until the corporation was more thoroughly established than it was by this primary step. Now, there is no proof tending to show the plaintiff's agents had any sort of knowledge of the corporate existence of 'The McGowan Pump Company,' in fact, down to the very moment of signing the contract of June 23, 1881, when the defendants testify they told Beach of it, and that they were contracting as a corporation, which is denied by the plaintiff." "There is no proof whatever that plaintiff's agents" "were ever informed by defendants of their own corporate capacity, be it what it may, at any time prior to the signing of the contract, or that by other means they had such information. Therefore the court charges you, that, by their relations in fact, the course of their dealings with the plaintiff, as shown by their letters and repeated interviews with each other throughout the negotiations, from the beginning to the moment of signing the contract, the defendants are estopped, in fact and law, to deny that, as to the plaintiff, they were partners in making the contract, unless you believe that they then disclosed their corporate character to Beach. If you find that to be a fact, the court has already told you that your verdict should be absolutely for the defendants. If you do not find that to be a fact, but, on the contrary, believe the plaintiff's proof that no such disclosure was made, the defendants are liable as partners for whatever damages you may find for the plaintiff, on the merits of the case."

The court also gave the following instruction, at the request of the defendants: "2. If, before the 23d day of June, 1881, the McGowan Pump Company had become incorporated and organized under the laws of Ohio, with Theodore McGowan as president and Robert C. Bliss as secretary, and if, when the

contract of that date was made, the plaintiff was informed by the defendants that the McGowan Pump Company, which entered into said contract, was a corporation, then the plaintiff cannot recover against the present defendants."

The court refused to give the following instructions asked by the defendants, and to each refusal the defendants excepted: "If the McGowan Pump Company, which entered into the contract of June 23, 1881, was in fact an incorporated company and not a partnership, then the plaintiff cannot recover in this case, whether the plaintiff supposed it to be a partnership or not." "31. If the agent of the plaintiff, sent here to make a contract for this work, did contract with the McGowan Pump Company, and had it explained to him that the said company had organized as a corporation, and the defendants went on under said corporation, and did the work provided for, which the plaintiff subsequently took from said corporation, they cannot now deny that they dealt with the said corporation."

It is objected, by the defendants, that the court did not specify any limit of time prior to the making of the contract of June 23, 1881, during which the holding out of the defendants to the plaintiff as partners, and the dealing of the plaintiff with them as such, would have the effect, in the absence of notice to the plaintiff of the change from a partnership to a corporation, to fix the liability of the defendants as partners; that, although the bill of exceptions states that the plaintiff and the defendants were in correspondence prior to the organization of the corporation, it does not state that there had been any dealings between them; and that, especially there was error in refusing to charge proposition 31, above quoted.

The bill of exceptions does not show that there was any evidence that the defendants went on doing the work as a corporation, or that the plaintiff took the work from the corporation. There was no exception to the general charge of the court on the subject, above quoted. The court, in its general charge, distinctly instructed the jury that, if McGowan, as president of the corporation, and Bliss as its secretary, made the contract of June 23, 1881, in the name of "The McGowan

Pump Company," and informed the agent of the plaintiff at the time that the McGowan Pump Company was a corporation and was contracting in that capacity, the defendants were entitled to a verdict. Again, the court instructed the jury that if, notwithstanding any want of authority in McGowan and Bliss to contract for the corporation, they assumed, in their corporate capacity, to contract with the plaintiff, and to notify the plaintiff's agent, Beach, that they so assumed to act, or he otherwise knew it, their verdict must be for the defendants, irrespective of any want of authority. Again, in its general charge, the court instructed the jury as follows: "If the jury find that, on the 23d of June, 1881, there was in existence a corporation called 'The McGowan Pump Company,' qualified to do business, when the contract of that date was signed in that name, and that the defendants were authorized to act for it, and informed Beach that it was that corporation making the contract, the verdict must be for the defendants, because the corporation is not here sued."

This disposition of the question of partnership by the court seems to us to have been proper, and to have been as favorable to the defendants as they were entitled to ask.

The criticism as to the want of the specification of the limit of time has no force. The bill of exceptions does not purport to state all the evidence that was given at the trial. It does not show what dealings had been had between the parties prior to the making of the contract of June 23, 1881; nor does it appear by the record that the attention of the court was drawn by the defendants to this point of the limit of time, or that any request was made in regard to it.

It is next objected, by the defendants, that the petition of the plaintiff alleges that the contract sued upon was fully performed by the plaintiff, and alleges, as a breach, that the defendants failed to erect and complete the machinery within the time set forth in the contract; that the averment of performance by the plaintiff is inconsistent with a recovery based on the theory that the defendants waived the performance by the plaintiff of the part of the contract relating to the time when the boat was to be furnished; that the plaintiff could not recover,

on the averments of the petition, without proving that the boat was ready to receive the machinery in time to allow it to be erected on the boat before the end of sixty days from June 23, 1881; and that the proof was that the boat was not ready for the machinery until about the 10th of November, 1881.

On this subject the court charged the jury as follows, under the exception of the defendants: "If the jury find that the contract was made, as alleged, with defendants, and that, after the day named for the completion of the contract, the work not being then completed, the boat was not then in readiness to receive it, yet, if the boat was thereafter made ready by James Mack, and the defendants proceeded under the contract, they were then bound to complete it within the same length of time contemplated by the original agreement, and such additional time as may have been lost in the prosecution of the work, occasioned by Mack's delay in the construction of the boat, and, failing in this, they are liable for the consequences of such failure and delay. Therefore, the court charges you that the defendants are only liable for any damage caused by delay for the period of delay found by application of the above rule to the proof in this case."

The defendants contend that this was not a proper charge under the issues, and that, if the boat was not ready for the machinery within the sixty days provided for by the contract, the agreement of the defendants, if they proceeded to construct the machinery, became an agreement to deliver it within a reasonable time after the boat should be made ready to receive it. In accordance with these views, the defendants asked for the following instructions, each of which was refused, and to each refusal they excepted: "4. That the contract sued on is entire, and required the plaintiff to have the machinery therein described built and set up on board a boat to be furnished by the plaintiff within 60 days from June 23, 1881, and that, if the plaintiff failed to furnish such boat until after the said period of 60 days from June 23, 1881, had expired, and, by reason of such failure, the defendants were unable to begin to set up such machinery on board said boat until after the expiration of said period of 60 days from

June 23, 1881, then the defendants are entitled to recover." "21. That, if the boat was not ready for the machinery in time to have the same put up within sixty days from the date of the contract, but the parties subsequently proceeded, at the request of Beach, to put the machinery upon the boat, they were only bound to proceed with reasonable diligence under the circumstances, and were not bound to complete the same within sixty days thereafter, if the boat or the foundations provided for the machinery were so insufficient as to prevent such completion within said time." "23. That, as the machinery was to be put up on a boat to be furnished by the plaintiff, to require of the defendants that they have the machinery finished and put up on the boat within the sixty days, the plaintiff must have had the boat ready and fit for the purpose in time to enable the defendants to have put the machinery in place upon the boat, the same being ready therefor, within the sixty days, and, if the boat was not ready in such time, then the plaintiff cannot recover damages for not having the said machinery so completed within sixty days. In such case the defendants were only bound to proceed with due diligence under the circumstances."

The argument on the part of the defendants is, that the plaintiff, by failing to have the boat ready in time for the performance of the contract according to its terms, prevented such performance; that there was no mere postponement of it for the number of days of delay caused by the plaintiff; that there is nothing to show that the defendants agreed, or would have agreed, to erect the machinery within sixty days after November 10, 1881; that, although both parties went on to perform the contract, the element of the fixed time was eliminated from it; and that the true rule is that the contract was to be performed in a reasonable time, having regard to the nature and circumstances of the performance.

The bill of exceptions states, that the plaintiff "gave evidence tending to show that the machinery named in the said contract of June 23, 1881, was not completely finished and put upon said boat within the sixty days named in said contract, nor for a long time thereafter;" that, in consequence

thereof, it "suffered great delay in the use of the said boat and machinery, and great damage in having to expend a large sum of money upon the same; and that the plaintiff lost a very large sum of money by the breach of said contract before it," the machinery, "was finished."

The petition contains an allegation of special damage, from the loss of tan bark occasioned by the delay in not erecting the machinery within sixty days from June 23, 1881; but the bill of exceptions does not show that there was any evidence tending to establish this special damage, except as it may be inferred, from the general charge of the court, that such testimony was offered. But the court, in its general charge, instructed the jury as follows: "The contract bound the defendants to complete the machiney and set it up on the boat within sixty days. It is too plain for argument, that the failure of the plaintiff to have the boat ready would excuse the defendants from strict compliance with this part of the contract, and that all delay which occurred before the boat was ready is out of the case. The plaintiff was as much responsible for that as the defendants, or sufficiently so to preclude him from complaint on that score."

It is, therefore, claimed by the plaintiff that no damages were included in the verdict on account of the delay in not erecting the machinery within sixty days from June 23, 1881. This appears to be a sound proposition. We see no error in the charge of the court, that, if the defendants proceeded under the contract, they were bound to complete the work within the length of time contemplated by the original agreement, and such additional time as was lost by the delay in the construction of the boat. There is nothing in the bill of exceptions to show that the machinery could not have been erected within sixty days after the boat was ready to receive it. The parties treated the contract as in full force, except as to the time in which it was to be performed, and the work was done and the payments were made under the contract as thus extended in time. The defendants made no claim before the suit was brought, that the contract was rescinded by reason of the non-readiness of the boat until the 10th of No-

vember, 1881, or that there was any reason in that fact which prevented them from complying with their part of the contract within the sixty days after the delivery of the boat. No such defence is set up by them in their answer, and they introduced no evidence to that effect, so far as the bill of exceptions shows. These views are in accordance with the ruling of this court in *Phillips Co.* v. *Seymour*, 91 U. S. 646. The plaintiff went on paying the defendants on account for the machinery, and the defendants proceeded in erecting it without complaining of the delay in the furnishing of the boat, and without any claim that they were not required to furnish the machinery within the sixty days after the furnishing of the boat. See, also, *Graveson* v. *Tobey*, 75 Ill. 450.

The next assignment of error relates to the effect of the contract of March 30, 1882, set up in the third defence in the amended answer. The theory of the defendants is, that this contract was substituted for all prior contracts and ought to have been the basis of the suit. The Circuit Court treated it as merely waiving the provision of the original contract in regard to the time required for pressing and delivering each bale.

The court, in its general charge, charged as follows, in regard to the contract of March 30, 1882, under exception by the defendants: "But the plaintiff has not sued on that contract, nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine, and nothing else. This contract is pleaded by defendants as a defence to a claim of breach, and, so setting it up, the only question is whether it constitutes a defence. It is only a supplemental contract to that of June 23. It continues the guarantees of that contract, with the exception as to time. It does not make new guarantees for a new consideration, but obligates the defendants to carry out the old contract with the named exception, and imposes on defendants new obligations about the patterns, &c., which are independent and separable from the old contract and the old consideration. The court, therefore, charges you, that its only effect is to reduce the original guaranty of the capacity of the machine,

in respect to the time for pressing the bale, if you find there was no fraud in procuring it; if there was such fraud, it leaves that guaranty still in force." And again: "The defendants claim that its proper construction requires that the 1500 tons only applies to strength of material to endure that pressure, as a maximum of endurance, not for a continuous working pressure. It belonged to the plaintiff to say what it wanted, and to defendants to consider it when they made the contract, whether they could give that which was wanted. There is no proof tending to show that the proper construction is, that the plaintiff only wanted a machine of sufficient strength to endure a test of 1500 tons, but, on the contrary, read in the light of the circumstances proved, the language of the contract clearly means, that the plaintiff wanted a machine by which it could deliver on each and every bale a compression of 1500 tons, if it chose so to use it, and which would endure the work for the length of time such a machine would wear, under prudent and reasonable management by the plaintiff." Still further: "If the jury find that the terms of the guaranty provided by the contract are in writing, as expressed in the letters of April 23 and July 5, 1881, then, while the McGowan Pump Co. did not guarantee that bark would bale, it did guarantee to furnish practical machinery, set up on board of the boat, that was capable, in its designs and in all its parts, of being worked to apply 1500 tons pressure to press a bale of bark every two and one-half minutes, or within a reasonable time, if the contract of March 30 be valid, and capable, with reasonable care, in view of the character of such machinery and of the nature of the work, of continuous operation for the ordinary duration of such mechanism constructed for similar uses." "If the jury find that the contract of March 30, 1882, was duly made and is binding between the parties, it in nowise affects the right of the plaintiff to recover for any breach of the original agreement between the parties upon which this action is founded, or of the guarantees contained in such original agreement, except for the failure in respect to the time required to press bark with the machinery into bales, and to

remove them from the cylinders. All the other obligations and guarantees of the original contract would remain in full force, and the plaintiff's right to recover for their breach would remain unaffected by the contract of March 30, 1882."

The defendants requested the following instructions, each of which was refused by the court, and to each refusal the defendants excepted: "5. That the plaintiff cannot recover upon the issue in this cause if it appear to the jury, from the testimony, that the contract which has been read in evidence, bearing date March 30, 1882, was in good faith executed and delivered by both the parties to this cause." "10. That the plaintiff does not entitle itself to recover upon the contract of June 23, 1881, by showing that the defendants failed to comply with the contract of March 30, 1882." "That, even if it be true, and believed by the jury from the testimony, that the contract of March 30, 1882, was broken by the defendants by non-delivery of the receipts, or of assignments of patent rights, therein described, nevertheless, such breach does not entitle the plaintiff to recover in this case upon the contract of June 23, 1881." "12. A breach of the contract of March 30, 1882, entitles the party who did not break such contract, if it suffered damages by reason of such breach, to recover in an action for such damages founded upon such contract, but it furnishes no ground for recovery in this case upon the contract of June 23, 1881, for damages suffered by reason of a breach of the last-named contract." "14. That, by the contract of March 30, 1882, the parties waived and withdrew all previous agreements and guarantees relating to the hydraulic machinery, except only that the material of which it was composed had sufficient strength to work up to a total pressure of a thousand tons, and that the defendants are not liable to damages, in this action, for any defect in said hydraulic machinery, if said material had sufficient strength to work up to such pressure, unless, under the charge of the court, the jury believe, from the testimony, that the said contract was procured by fraud or false representation, and is, therefore, not binding upon the plaintiff." "28. If it appear, in this case, that the machinery contracted for in the contract of March 30, 1882, was not pos-

sible to be made as working machinery, because the material of which it was to be made was not capable of sustaining any such working pressure, yet that the material used by the defendants was of the strength of 1500 tons, then the contract of the 30th March, 1882, must be construed as relating to the strength of the material and not to the working capacity of the machinery."

The argument on the part of the defendants is, that the instrument of March 30, 1882, contained a new contract, and that the effect of it was to withdraw all guarantees relative to the hydraulic machinery, except that the strength of the material would be such as to bear 1500 tons pressure; that the new contract did not modify the original guarantee that the boilers and machinery for propelling the steamboat would be made in a workmanlike manner and of first-class material, with sufficient capacity to do the required work and to pass government inspection, but that all guarantees in regard to the hydraulic machinery intended to press the bark into bales were withdrawn, except the one relating to the strength of material; and that, as to that, all guarantees were withdrawn except that the material would bear 1500 tons pressure, not for continuous work, but a pressure up to 1500 tons, or without bursting upon test.

The view taken by the court on this subject is shown by the following instructions given by it, to each of which the defendants excepted: "5. The written contract, if the jury find it was made between the plaintiff and the defendants, requires the machinery to be made under it to be constructed in a workmanlike manner and of first-class materials and to be set up aboard of the plaintiff's boat, in Cincinnati. The machinery is to have sufficient capacity to do the required work, and is guaranteed by the McGowan Pump Company. The contract having thus defined the character of the work, it cannot in that respect be varied by parol evidence, which is admissible only to enable us to properly interpret the contract. It required the machinery to be constructed in a workmanlike manner and of first-class materials." "6. The machinery being constructed to be set up on the plaintiff's boat, it is for the

jury to determine what the boat was that was referred to, and, if the boat intended was one provided to be constructed by one James Mack, of a kind, and of dimensions, and with bulk-heads and foundations then defined and understood by the parties, then this contract to construct the machinery required the McGowan Pump Company to furnish whatever was necessary for the efficient working of the machinery upon the boat and bulk-heads so defined and understood by the parties, for rendering the machinery stable to do the required work, when set up aboard the boat."

The court also refused to give the following instructions asked by the defendants, and they excepted to each refusal: "18. If the machinery contracted for in this case was in fact incapable of working up to the pressure of 1500 tons, required by contracts between the parties, and this incapacity resulted not from any defect of workmanship or construction, but from the fact that such machinery, of the character and description provided for by said contracts, cannot be made capable of working up to such pressure, and if the machinery was in fact made of first-class material and in a workmanlike manner, and was capable of receiving the greatest pressure machinery of the description called for by said contract could be made to work up to, then the fact that said machinery will not work up to such pressure does not entitle the plaintiff to recover any damages based on such incapacity to work up to such pressure." "That the guarantee referred to in the contract of June 23, 1881, is a guarantee of the machinery to be made, and not a guarantee as to its operation upon the boat which the plaintiff might present for that purpose to the defendants."

The defendants also excepted to the following parts of the general charge of the court: "But, if you find that, within the range of mechanical art, such pressure could have been delivered to the bark, it was their obligation to do it. The whole field of mechanical engineering was open to them, except so far as it was restricted by the necessity of placing the machine upon a floating foundation, to be furnished by the plaintiff, of which more hereafter will be given you in

charge. They were not restricted in plans, specifications, or materials, and were bound to select such plans and materials as were available and capable of doing the work. It was their misfortune if the price demanded was not sufficient to cover the cost, but that fact, if it be one, cannot relieve them. In short, they contracted as 'mechanical engineers,' and as manufacturers, and are bound by the contract as they made it in this respect."

In regard to the foregoing matters the defendants allege, as error, that the Circuit Court held that the contract was broken unless the hydraulic machinery had sufficient capacity to do the required work, was constructed in a workmanlike manner and of first-class materials, and would work efficiently and be capable of continuous operation for the ordinary duration of such mechanism, constructed for similar uses, and be able to deliver a pressure of 1500 tons to the bark, and that the plaintiff could by it compress every bale to the extent of 1500 tons pressure, for the length of time such a machine would work under prudent and reasonable management.

The contract of March 30, 1882, did not, as erroneously stated in the 28th request of the defendants, contract for any machinery. It refers to the machinery as being in existence, and provides for the transfer to the plaintiff of the title to it and to certain extras, and adjusts the amount due under the original contract at the sum of $11,200. It contains a modification of the original contract in respect to the time required for each pressing and delivery of a bale, and provides, in substance, that the original agreement, with its guarantees as to the hydraulic machinery, shall otherwise remain unaltered. The court, in its general charge to the jury, charged on these matters as follows: "But it is insisted this contract of March 30, 1882, is not binding and can have no effect in this suit, because defendants have not performed their part of the consideration, namely, the delivery of the vouchers or receipts mentioned, the transfer of the patterns, the interest in the patents for the accumulator, and the double end; that, as to the latter, there is no patent and can be no performance. The defendants insist, on the other hand, that the balance of

the money has not been paid by the plaintiff, and it cannot complain of non-performance, and there is proof tending to show defendants have still pending an application for this patent. The court regards all this subject as immaterial to this controversy, and charges you that the obligation to perform these things by the defendants does not arise until the money is tendered or paid, and no breach could be averred until that has been done. But the plaintiff has not sued on that contract nor averred any breach of it in that respect. It has sued for breaches of the guaranty for a good machine, and nothing else. This contract is pleaded by defendants as a defence to a claim of breach, and, so setting it up, the only question is whether it constitutes a defence." "The court, therefore, charges you, that its only effect is to reduce the original guaranty for the capacity of the machine in respect to the time for pressing the bale, if you find there was no fraud in procuring it; if there was such fraud, it leaves that guaranty still in force. But you must understand that the failure, if any, of the defendants to deliver the vouchers, patterns, &c., does not at all contribute to any alleged breach of the guaranty for the capacity and quality of the machine, and such failure does not entitle plaintiff to recover for anything sued for in this suit."

We are of opinion that the court rightly disposed of the questions involved in the foregoing branch of the case.

It is also alleged, by the defendants, as error, that the court instructed the jury, that if they found for the plaintiff, they were not to make any deduction from the amount of damages on account of any balance claimed to be due from the plaintiff to the defendants on account of the contract for the machinery, or on account of any other contract. The defendants claimed to recoup the sum of $7200 as remaining due to them under the contract of June 23, 1881, or that of March 30, 1882, and the further sum of $1531.46 for extra work alleged to have been performed by them; but they did not, in any of their pleadings, set up any counter claim or right of recoupment as to those items; and it is alleged, in the fourth defence in their amended answer, that an action is pending against the

plaintiff by the McGowan Pump Company to recover the $1531.46.

It is also alleged, by the defendants, as error, that the court did not instruct the jury, as requested by the defendants, that, although the machinery was in fact incapable of working up to the pressure of 1500 tons, and the incapacity resulted from the fact that machinery of the character and description provided for by the contract could not be made capable of working up to such pressure, the fact that it would not work up to such pressure did not entitle the plaintiff to recover any damages based on such incapacity. The bill of exceptions states that the plaintiff gave evidence tending to show that the machinery was only of the value of scrap, and it does not state that there was any testimony given to show that, without the capacity called for by the contract, it was of any value beyond its value as scrap iron, or that there was any testimony tending to show that the loss of actual value upon the machinery was less than the amount found by the jury, or that the machinery had any value except that of old iron, if the pressure with which it would work would have no effect in doing the needed work upon the tan bark.

The rule of damages laid down by the court was as follows, and was not excepted to: "The rule for measuring the plaintiff's damages is to find the difference between the money value of the machinery contracted for, if it had been constructed in all respects according to the contract as it has been construed for you by the court, and the money value of the machinery as it was actually constructed and delivered to the plaintiff, to which may be added the items of expense for keep of the boat during the delay, caused solely by the delay."

As to the refusal of the court to give the 24th instruction requested by the defendants, we are of opinion that the general charge of the court properly covered the matter involved, and that the court made no error in refusing to charge as requested in regard to the contract of April 19, 1882.

There are other matters arising on the charge and the refusals of the court to charge, which are either covered by

the observations already made, or upon which, although the questions raised in regard to them have been considered by the court, it is not deemed necessary specially to remark.

The objection to the competency of the testimony of the witness Kemplin, as an expert, was properly overruled. He was a hydraulic engineer, and had been engaged in the construction of steam-engines and other machinery for many years, although he had never built any steam-engines to be used on the Western rivers. He was on board of the boat during its trip from Cincinnati to Paducah, and saw the propelling machinery in operation and examined it, and gave testimony as to the value of propelling engines for such a boat and as to what it would cost to make them good. The question as to the weight of his evidence was one for the jury, in view of his testimony as to his experience.

On the whole case, we are of opinion that there is no error in the record, and the judgment of the Circiut Court is

Affirmed.

HARTRANFT *v.* WIEGMANN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued April 20, 21, 1887. — Decided May 2, 1887.

Shells cleaned by acid, and then ground on an emery wheel, and some of them afterwards etched by acid, and all intended to be sold for ornaments, as shells, were not dutiable at 35 per cent. ad valorem, as "manufactures of shells," under Schedule M of § 2504 of the Revised Statutes, page 481, 2d edition, but were exempt from duty, as "shells of every description, not manufactured," under § 2505, page 488.

Duties are never imposed on the citizen upon vague or doubtful interpretations.

The findings of a jury, on which the Circuit Court reserved points of law, having been treated by that court, and by the counsel for both parties in it, as amounting to either a special verdict or an agreed statement of facts, this court overlooked the irregularity, on a writ of error, and considered the case on its merits.

Opinion of the Court.

An action to recover back duties alleged to have been illegally exacted. Judgment for plaintiff; defendant sued out this writ of error. The case is stated in the opinion of the court.

Mr. Solicitor General for plaintiff in error.

Mr. Frank P. Prichard for defendants in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action at law, brought in a court of the state of Pennsylvania and removed into the Circuit Court of the United States for the Eastern District of Pennsylvania, by the firm of J. H. Wiegmann & Son, against the collector of customs for the District of Philadelphia, to recover moneys alleged to have been illegally exacted by him as duties on imported merchandise. After a trial before a jury, the plaintiffs had a judgment for $55.29, and the defendant has brought a writ of error. The record contains the following statement of the result of the trial:

"The jurors aforesaid, upon their oaths or affirmation aforesaid, respectively do say that they find as follows, to wit:

"Plaintiff imported into the United States from London, in December, 1881, and May, 1882, a quantity of shells, on which he paid duties June 11, 1883. Among these shells were: 37½ doz. regius murex; 8 doz. green ears; 3 doz. white ears; valued at $71.68, on which the collector imposed a discriminating duty of 10 per cent., or $7.16, as the products of a country east of the Cape of Good Hope; 12 doz. green snails; 27 doz. Lord's prayers; 12 doz. mottoes; 9 doz. Turk's caps; 3 doz. magpies; 8 doz. snails; 1 doz. trocus; 16 doz. green ears; 3 doz. white ears; valued at $125.70, on which the collector imposed a duty of 35 per cent., or $44.09, as manufactures of shells.

"The testimony in regard to these shells was as follows:

"Frederick W. Wiegmann. These shells were purchased in London. The merchants there obtain them from all parts of

the world; they are cleaned and prepared for market there; the epidermis is first cleaned off, and then the shells are ground or polished for the market; they are cleaned by acid; they are ground on an emery wheel to expose the pearly interior; the purpose of both operations is to fit the shells for market; we sell them for ornaments; we import them for the sea-shore, and sometimes we sell them for buttons, handles to penknives, &c.; there is no difference in name and use between the shells ground on the emery wheel and those not ground; the Lord's-prayer shell is sold for the same purpose; there is no new use.

"Dr. Joseph Leidy. [Regius murex shown witness.] That comes from Panama. [Green ear shown witness.] That is from the Pacific coast. [Two white ears shown witness.] One of these is from the west coast of Africa and the other from Japan. Most shells have three layers; they have the thin brown skin, the outside layer, like the common fresh-water mussel; then they have an inner layer, which is very brilliant. Very frequently the water is sufficient to wear off the skin, and they show the dull layer on the outside. By artificial means that opaque whitish layer is ground off by means of a wheel, and the inner layer is exposed, which presents that inner pearly appearance. [Samples shown witness.] These shells have had the outer layer ground off so as to exhibit the beautiful inner layer; that has been done by the application of a wheel, and afterward by polishing.

"Q. There is something here called the 'Lord's prayer.' I do not suppose you know it by that name, but please tell us about it.

"A. Well, I understand its nature. The shell happens to be of the kind which is very frequently imported and used as an ornament without any alteration whatever. The outer covering was taken off in the shape of letters, by first covering the letters with wax or grease, and then covering that with lime, having in the mean time eaten out the letters by acid or by etching. The object of taking off the epidermis is simply to show the internal beauty, for the purpose of ornament; and the object of taking off the second layer is the same, simply for the purpose of ornament.

"The jury find that the regius murex, green ears, and white ears, are products of countries west of the Cape of Good Hope, as above testified, and that the discriminating duty on them amounted to $7.16, which, with interest to October 5, 1883, amounts to $7.72.

"The jury find that the green snails, Turk's caps, magpies, snails, trocus, green ears and white ears have been ground upon an emery wheel in the manner and for the purpose described in the above testimony; that the duty collected on them as manufactures of shells amounted to $25.98, which, with interest to October 5, 1883, amounts $28.03.

"The jury also find that the Lord's prayers and mottoes have been etched with acid, in the manner and for the purpose described in the above testimony; that the duty collected on them as manufactures of shells amounted to $18.11, which, with interest to October 5, 1883, amounts to $19.54.

Recapitulation.

Discriminating duty	$ 7 72
Duty on ground shells	28 03
Duty on etched shells	19 54
	$55 29

"And the court reserved the following points:

"1. If the court should be of the opinion that both the shells ground on an emery wheel and the shells etched with acids, in the manner found by the jury, were not liable to duty as 'manufactures of shells,' but were entitled to be admitted free, as 'shells unmanufactured,' then judgment to be entered in favor of the plaintiff for fifty-five dollars and twenty-nine cents.

"2. If the court should be of opinion that the shells etched by acids in the manner found by the jury were liable to duty as 'manufactures of shells,' but that the shells ground on an emery wheel, as found by the jury, were not so liable, then judgment to be entered in favor of the plaintiff for thirty-five dollars and seventy-five cents.

"3. If the court should be of opinion that both the shells

ground on an emery wheel and those etched by acids were liable to duty as 'manufactures of shells,' then judgment to be entered for plaintiff for seven dollars and seventy-two cents only, being the amount of discriminating duty on shells found by the jury to have been imported from countries west of the Cape of Good Hope."

The defendant then moved for a new trial, in refusing to grant which, the court held, "that, in order to render the shells subject to duty as 'manufactures of shells' something more must be done than simply to remove the outer surface either by acids or mechanical means, and that, while the shells retained their special form and character, they could not be classified as 'manufactures of shells.'"

The finding of the jury is not in the usual form of a special verdict, but the jury make certain findings, and the statement is, that the court reserves the three points stated; and each point reserved is stated in one and the same form, namely, that if the court should be of opinion that the shells are dutiable thus and so, or are free from duty, then judgment is to be entered for the plaintiff for a specified sum. As the Circuit Court, and the counsel for both parties in that court, appear to have treated the findings and the reservation as amounting to either a special verdict or an agreed statement of facts, we are disposed to overlook the irregularity, and to consider the case on its merits. *Mumford* v. *Wardwell*, 6 Wall. 423.

It is contended, on the part of the government, that the shells were dutiable under the following provision of § 2504 of the Revised Statutes, Schedule M, p. 481, 2d ed.: "Shells, manufactures of: thirty-five per centum ad valorem."

On the other side, it is contended, that the articles were free, under the following provision of § 2505, p. 488, 2d ed., in regard to articles exempt from duty: "Shells of every description, not manufactured."

The collector levied a duty upon the shells of thirty-five per centum. The Circuit Court held that they were exempt from duty. The question is, whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner

layer, is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that the shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufactures of shells, within the meaning of the statute.

By the act of March 2, 1861, c. 68, § 22, 12 Stat. 192, a duty of 30 per cent. ad valorem was imposed on "manufactures of shell," and by the act of July 14, 1862, c. 163, § 13, 12 Stat. 557, that duty was increased to 35 per cent. ad valorem. By the act of July 14, 1870, c. 255, § 22, 16 Stat. 268, "shells of every description, not manufactured," were exempted from duty. These enactments were carried into the Revised Statutes.

It is stated in the brief on the part of the government that the interpretation of these provisions by the Treasury Department has not been uniform. In April, 1872, it ruled that "shells which have merely been cleaned and polished with acids cannot fairly be classified as manufactures of shells." In July, 1876, it ruled that shells engraved by the application of acids were manufactured shells. In August, 1877, it ruled, that where the manufacture of the shells consisted merely in polishing them and removing, by grinding or otherwise, a portion of the surface, the shells were exempt from duty, because their character and condition had not been materially changed, and they still preserved their identity as shells. At a later date, in regard to shells that had been cleaned by the use of the emery wheel and buffer, and shells which had been polished by the use of acids, it held that they were dutiable at the rate of 35 per centum, as manufactures of shells, on the ground that they had been advanced, by cleaning, grinding and otherwise, to a condition beyond that of crude, unmanufactured shells.

We are of opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured, and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell. The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In "Schedule M" of § 2504 of the Revised Statutes, p. 475, 2d ed., a duty of 30 per cent. ad valorem is imposed on "coral, cut or manufactured;" and, in § 2505, p. 484, "coral, marine, unmanufactured," is made exempt from duty. These provisions clearly imply, that, but for the special provision imposing the duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee* v. *Moffitt*, 20 Blatchford, 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, though labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence* v. *Allen*, 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mould, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and designed to be used in such new form. In *United States* v. *Potts*, 5 Cranch, 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States* v. *Wilson*, 1 Hunt's Merchants' Magazine, 167, Judge Betts held that marble which had been cut into blocks for the convenience of

transportation was not manufactured marble, but was free from duty, as being unmanufactured.

We are of opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, "as duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers* v. *Barney*, 5 Blatchford, 202; *United States* v. *Isham*, 17 Wall. 496, 504; *Gurr* v. *Scudds*, 11 Exch. 190, 191; *Adams* v. *Bancroft*, 3 Sumner, 384.

Judgment affirmed.

HARTRANFT *v.* WINTERS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued April 20, 21, 1887. — Decided May 2, 1887.

This case is affirmed on the authority of *Hartranft* v. *Wiegmann*, *ante*, 609.

This was an action to recover back duties alleged to have been illegally exacted. Judgment for plaintiff. Defendant sued out this writ of error.

Mr. Solicitor General for plaintiff in error.

Mr. Frank P. Prichard for defendant in error.

Mr. Justice Blatchford delivered the opinion of the court.

This is an action by Anton Winters, brought in a state court of Pennsylvania and removed into the Circuit Court of the United States for the Eastern District of Pennsylvania, against the collector of customs for the District of Philadelphia. The proceedings in it, and the questions arising, are in all respects the same as those in the case of *Hartranft* v. *Wiegmann*, just decided, the only difference being that in this case there were no shells called "green snails" or "mottoes" or "Turk's caps" or "magpies" or "trocus," and that there were

shells called "rose murex," "motto cowries," "banded snails," "Japan ears," "turbo shells," "red ears," and "pearl snails."

The same conclusion is arrived at as in the Wiegmann case, and the judgment of the Circuit Court is

Affirmed.

SNOW *v.* LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Argued April 19, 1887. — Decided May 2, 1887.

The first claim in letters-patent No. 127,933, granted to the Buffalo Dental Manufacturing Company as assignee of George B. Snow, June 11, 1872, for a new and useful improvement in steam bell-ringers is limited to a combination in which the piston and piston-rod are detached from each other, and is not infringed by the use of steam bell-ringers constructed and operated in conformity to the drawings and specifications of letters-patent granted August 25, 1874, to Charles H. Hudson for a new and useful improvement in steam bell-ringing apparatus.

This was a bill in equity to restrain an alleged infringement of letters-patent. Decree dismissing the bill, from which the complainants appealed. The case is stated in the opinion of the court.

Mr. James A. Allen for appellants.

Mr. George Payson for appellee.

Mr. Justice Matthews delivered the opinion of the court.

The appellants, who were complainants below, filed their bill in equity August 7, 1882, against the defendant, to restrain the alleged infringement of letters-patent No. 127,933, granted to the Buffalo Dental Manufacturing Company, as assignee of George B. Snow, on June 11, 1872, for a new and

useful improvement in steam bell-ringers; the Buffalo Dental Manufacturing Company being a joint stock association under the laws of the state of New York, of which the appellants were the sole officers, directors, shareholders, associates, and persons in interest. The specifications, with drawings annexed, of this patent are as follows:

"Specification describing certain Improvements in Steam Bell-Ringing Apparatus, invented by George B. Snow, of Buffalo, in the county of Erie, state of New York.

"This invention relates to the construction of a steam bell-ringer in such a manner as to prevent any apparent leakage, either of water or steam, without resorting to the use of stuffing-boxes; and, also, to cause the admission and release of the steam directly by the motion of the piston, and without the use of any intermediate parts between the piston and valves.

"Referring to the annexed drawing, Figure 1 [page 620] is an elevation of the device as applied to the bell of a locomotive. Fig. 2 [page 621] is a vertical section of the steam-cylinder on the plane *a b*, on an enlarged scale.

"A is a single-acting steam-cylinder, connected to the crank B on the bell-yoke by the slotted rod C. This rod should be of such a length that the piston G will be forced to the bottom of the cylinder as the crank B passes its lower centre, the slot through which the crank-pin passes being long enough to allow the crank to pass its upper centre freely, notwithstanding the disproportion between the throw of the crank B and the length of stroke of the piston-rod D. The piston G is disconnected from its rod D, to prevent any lateral strain being communicated to it, thereby decreasing to some extent the wear of the piston in the cylinder. The piston should be considerably longer than its length of stroke. The piston-rod D passes through a sleeve in the cylinder-cover I, which should be long enough to steady it and act as a guide, and is limited in its upward motion by the collar *d*. E is a conical exhaust-valve, seating upward against the bottom of the piston G. F is the steam-valve, also conical, and seating upward, containing within itself the tail of the exhaust-valve E,

such an amount of motion being permitted between the two that the steam-valve F will be raised to its seat and the exhaust-valve E be opened as the piston approaches the upper end of its stroke. Exhaust-passages M *m* are formed in the piston G, which communicate with the holes *m'* in the side of the cylinder by means of annular grooves turned in the side of the piston, the openings *m'* being of such a number and so disposed as to insure a constant communication with the passage M. The thimble H forms an annular space around the cylinder, from which the steam escapes through the passage O. If the piston is closely fitted, it will wear a long time with very little leakage, and what there may be will be caught in the annular grooves in the side of the piston, and passed at once through the exhaust-passages *m'*, thus preventing any leakage around the piston-rod D. It is advisable to use a packing of a single ring at the lower part of the piston, not so much to avoid leakage as to sustain the piston at the upper end of its stroke by the elasticity of the ring, until it is brought to the bottom of the cylinder by the return swing of the bell.

"The bell being set in motion, the crank B drives the piston to the bottom of the cylinder, closing the exhaust-valve and forcing open the steam-valve, admitting steam to the cylinder from the space S. As the piston is driven upward the exhaust-valve is carried with it, and as the piston approaches the end of its stroke the steam-valve is also raised to its seat, after which the exhaust-valve is opened. As the pressure is relieved, the exhaust-valve drops, leaving the passage M entirely clear during the return stroke, which is made by the momentum of the bell on its return.

"The arrangement of valves shown is not essential, as the exhaust-valve may be placed in a cavity in the body of the cylinder opening into the exhaust-passage, and both the steam and exhaust-valves be closed by the direct impulse of the steam, the openings *m'* being made low enough in the cylinder to allow the piston to pass them at the upper end of the stroke; or, by using a piston in the form of an inverted cup, the steam and exhaust may be worked through openings in the side of the piston and cylinder, the expansion of the steam

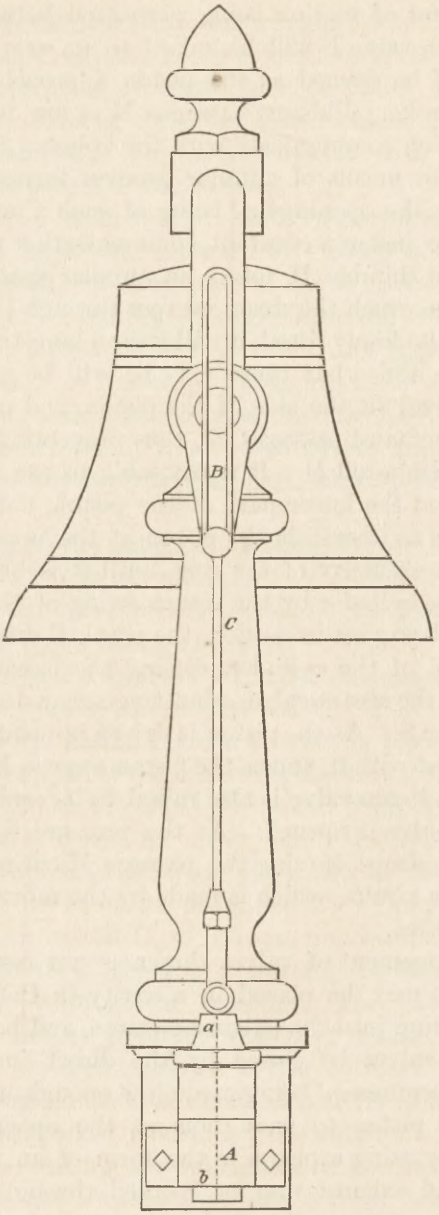


Fig. 1.

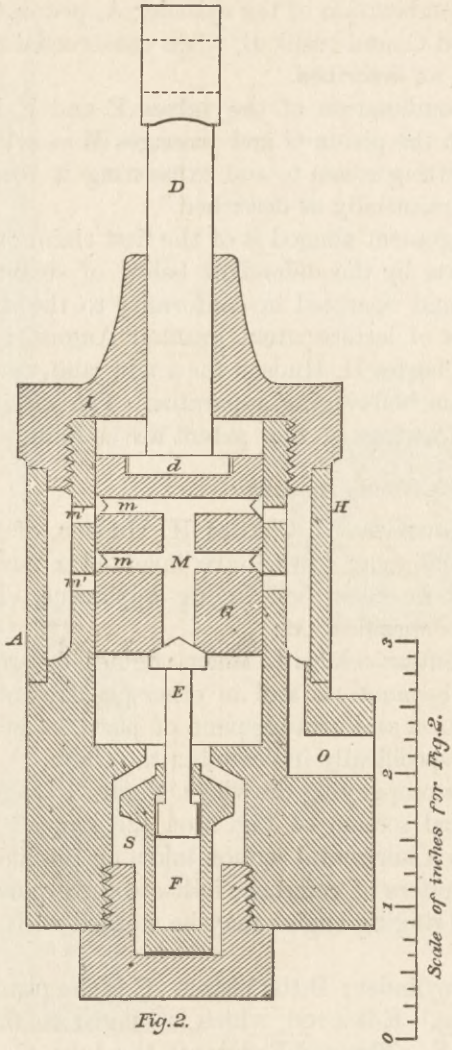


Fig. 2.

doing the work. The disadvantage of the first of these plans is, that the valves are closed so violently that they soon wear out; of the second, the difficulty of getting rid of water of condensation.

"Having thus fully described my device, I claim as my invention —

"1. The combination of the cylinder A, piston G, piston-rod D, slotted rod C, and crank B, when constructed and operated substantially as described.

"2. The combination of the valves E and F, both seating upward, with the piston G and passages M *m m'*, for the purpose of admitting steam to and exhausting it from under the piston G, substantially as described."

The infringement alleged is of the first claim only, and consists in the use by the defendant below of steam bell-ringers constructed and operated in conformity to the drawings and specifications of letters-patent granted August 25, 1874, No. 154,394, to Charles H. Hudson for a new and useful improvement in steam bell-ringing apparatus. The specifications and illustrative drawings of that patent are as follows:

"*To all whom it may concern:*

"Be it known that I, Charles H. Hudson, of the city and county of Dubuque, Iowa, have invented a new and useful improvement in steam bell-ringing apparatus, of which the following is a specification:

"This invention relates to steam-engines, designed for ringing bells on locomotives and in other places; and consists in the construction and arrangement of parts, as hereinafter described, and specifically indicated in the claim.

"In the accompanying drawings, Figure 1 [page 623] represents a vertical section of Fig. 2 on the line *x x*; and Fig. 2 [page 623] is a horizontal section taken on the line *y y*, Fig. 1.

"Similar letters of reference indicate corresponding parts.

"This bell-ringing engine may be worked with either steam or air.

"A is the cylinder; B the piston. C is the piston-rod. D is the valve-ring. E is a rod, which is hinged to the piston-rod at the point F. This rod E slides in the tube G, which is attached to the bell-crank. This connection is such that the lower end of the tube G will be at the shoulder H when the bell-crank is at the lowest point, and the piston at the bottom of the stroke. The movement of the tube upon the rod E will allow the bell to be turned over and the bell-crank to go to its highest point freely, while the piston is at the lowest point.

Fig. 1.

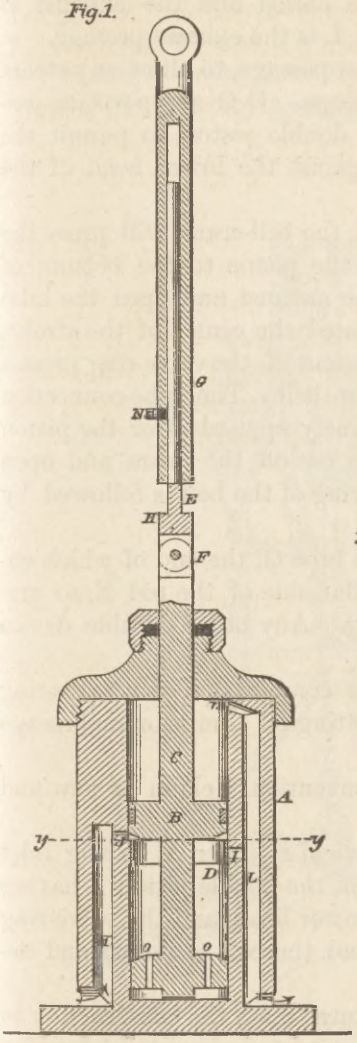
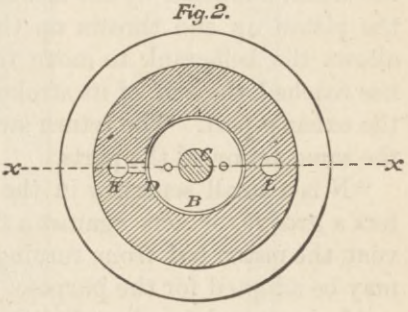


Fig. 2.



"I is the exhaust-port; J the inlet-port. The valve-ring D is so arranged in regard to the ports, that the movement of the piston to the lowest point moves the valve-ring down, and closes the exhaust and opens the inlet port. When the piston moves to the other end of the stroke the ring is moved in the

other direction, and the inlet is closed and the exhaust is opened. K is the inlet-passage. L is the exhaust-passage. *m* is a small opening into the exhaust-passage, to allow any steam which may pass the piston to escape. O O are ports or passages in the lower head of the double piston, to permit the steam (or air, if used) to act against the lower head of the cylinder.

"When the bell is in motion, the bell-crank will press the tube down on the rod and force the piston to the bottom of the stroke, and thereby close the exhaust and open the inlet ports. When the crank has passed the centre of the stroke, the steam admitted by the movement of the valve-ring presses the piston up and throws up the bell. The tube-connection allows the bell-crank to move freely upward after the piston has reached the end of its stroke, cut off the steam, and open the exhaust-port. The return swing of the bell is followed by the same action of the parts.

"N is a small set-screw in the tube G, the end of which enters a groove, or acts against a flat side of the rod E, to prevent the piston-rod from turning. Any other suitable device may be adopted for the purpose.

"I do not claim, broadly, the combination of a valve-ring with a piston and cylinder for cutting off admission and escape of steam alternately; but,

"Having thus described my invention, I claim as new and desire to secure by letters-patent —

"In combination with the vertical cylinder A, having inlet and exhaust ports K J and I L *m*, the double piston B having openings or passages O O in its lower head, and the valve-ring D, arranged below the upper head thereof, as shown and described, to operate as specified."

The question of infringement turns upon the construction to be given to the first claim of the patent sued on, to determine which it is necessary to consider the state of the art at the time of its date. This is shown by a prior patent issued to Snow, No. 11,307, dated July 11, 1854, and which had expired before the granting of the patent sued on.

The specifications and accompanying drawings of that patent are as follows:

"*To whom it may concern:*

"Be it known that I, G. B. Snow, of Buffalo, in the county of Erie and State of New York, have invented a new and useful method of employing steam to ring the bells of locomotives,

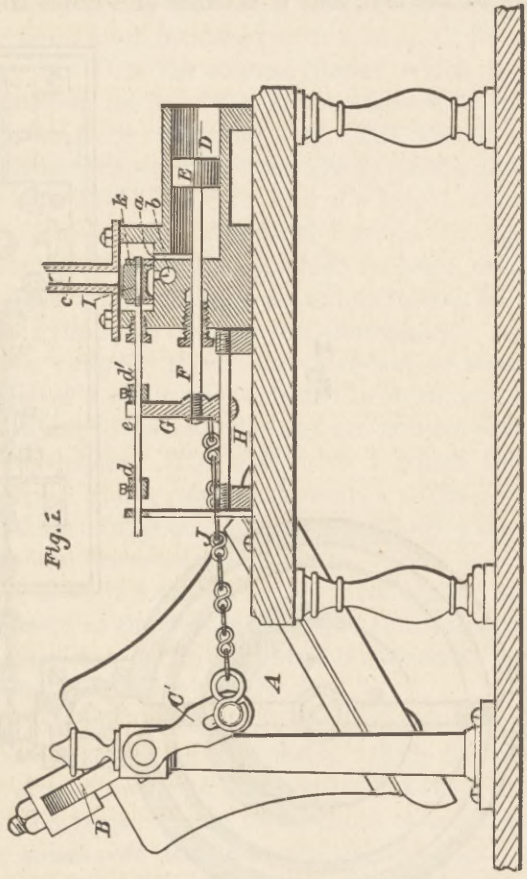


Fig. 1.

and other bells; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings forming part of this specification, in which —

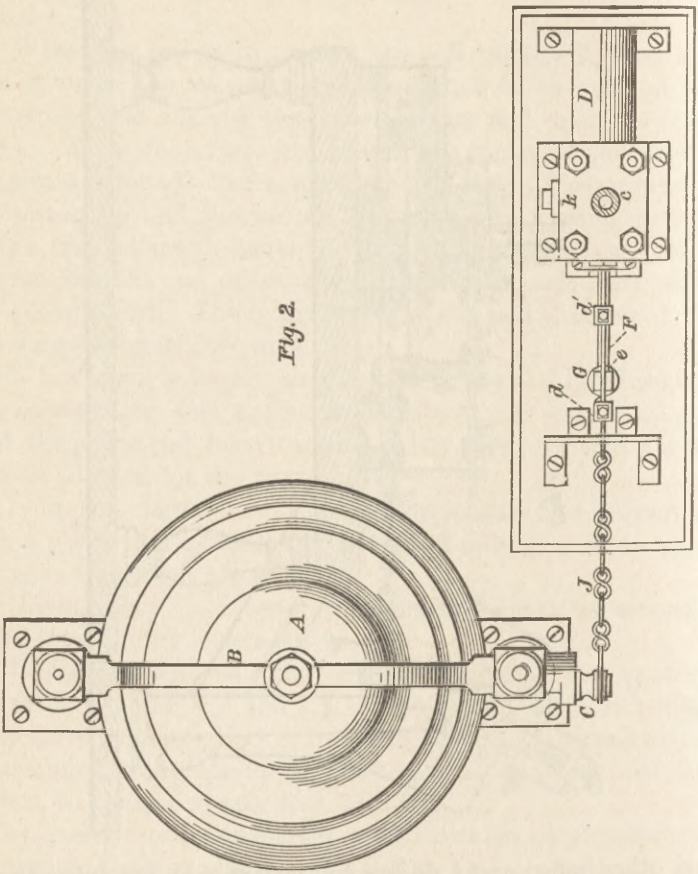
"Fig. 1 is a longitudinal vertical section of the apparatus I employ applied to a bell.

"Fig. 2 is a plan of the same.

"Similar letters of reference indicate corresponding parts in both figs.

"My invention relates to the application of steam power to the ringing of the bell, and it consists of a novel combination

Fig. 2.



and arrangement of a direct acting engine with the bell in such a manner that the bell, being swung by the engine in one direction, is allowed to swing in the opposite direction by its own gravity and momentum, and is caused thus continuously, automatically, to work with the same freedom, but greater

regularity and consequent increased clearness of note, as is obtained by the ordinary manual process of ringing..

"To enable others to make and use my invention I will proceed to describe its construction and operation:

"A in the drawing is the bell, which is suspended by a yoke, B, of the usual kind, furnished with a lever, C, for the purpose of ringing it. D is the steam-cylinder, which is placed in a suitable position for its piston E to connect with the yoke, and by its movement to swing the bell. The bore of the cylinder for a locomotive engine would require to be of a diameter about one and a quarter ($1\frac{1}{4}$) inches, and of a length about four and a half ($4\frac{1}{2}$) inches. The piston-rod F works through a stuffing-box at one end of the cylinder, which is closed, and it carries a cross-head, G, which works on a fixed guide-rod, H. The other end of the cylinder is open to the atmosphere. At the closed end of the cylinder there is a valve-box or steam-chest, K, which receives a steam-pipe, *c*, from the boiler, and has a steam-port, *a*, leading to the cylinder and an exhaust-port, *b*, leading to the atmosphere. The slide-valve I which this valve-box contains has a rod, *e*, passing through a stuffing-box and furnished with two tappets, *d d'*, between which it is embraced by a fork on the cross-head G. These tappets are adjusted so that the fork shall come in contact with them to open or close the steam-port at the proper time, and thus regulate the movement of the piston. The cross-head is connected with the lever C of the bell-yoke B by a chain, J.

"Fig. 1 of the drawing represents the steam-port *a* open, and the steam acting on the piston, which has nearly terminated its stroke, owing to the cross-head having come in contact with the tappet *d'* and being about to move the valve to close the steam-port and open the exhaust-port. As soon as the steam is shut off and the momentum of the bell is spent the latter will swing back, drawing with it the piston, until the cross-head strikes the tappet *d* and moves the valve far enough to open the steam-port and close the exhaust-port, when the motion of the bell will be again reversed.

"The motion which is thus given to the bell is precisely similar to that produced in ringing by hand, and could not

be produced by the direct application of steam power to swing it in both directions, which must produce too positive a motion and could not allow it to swing with the same freedom as when the power is only applied in one direction and the bell is allowed to return under the influence of gravitation alone.

"I do not claim of itself as new ringing bells by the application of steam power, as such, in a positive manner, by rigidly connecting the engine with the bell in both directions of the swing of the latter, has before been done, nor do I claim the several devices herein named individually as new, but I do claim as new and useful, and desire to secure by letters-patent, the manner herein described of ringing the bell by the application of steam power and the gravity and momentum of the bell combined by means of the direct acting engine attached by chain, or other equivalent mechanical device, to the bell, and arranged, combined, and operating with the bell as specified, and so that the bell is swung in one direction by the engine and then let loose or free to swing back in the opposite direction by its own gravity and momentum to produce the ring or sound, and the steam alternately admitted to and exhausted from the engine by the action of the engine and movement of the bell combined, substantially as specified, and whereby the same freedom in the swing of the bell to produce a long and clear sound, as is produced by the ordinary manual process, but with greater regularity and consequent increased clearness of note, is automatically obtained, as herein set forth."

On final hearing in the Circuit Court, the bill was dismissed for the reasons stated by the circuit judge in his opinion, as follows:

"Although the complainants' patent of June 11, 1872, suggests the principal and the most valuable parts of the combination found in the defendant's steam bell-ringer, the plain and explicit language of the specification requires a construction of the first claim which will enable the defendant to escape liability as an infringer. The first claim must be limited to a combination in which the piston and piston-rod are detached from each other.

"The patentee doubtless considered that the detachment of the piston and piston-rod would assist materially in effecting one of the two expressed objects of his invention, viz., the prevention of leakage of steam. To prevent the escape of steam around the piston-rod, he proposed to confine the steam behind the piston instead of introducing it into the cylinder in front of the piston, as was done in his earlier invention. Accordingly, he located the steam passages behind the piston, and adopted a tightly fitting piston; and, in order that the piston might remain tight, he adopted a detached piston-rod to relieve the piston from lateral strain. The specification states that 'the piston is disconnected from its rod to prevent any lateral strain being communicated to it, thereby decreasing, to some extent, the wear of the piston in the cylinder;' and further, 'if the piston is closely fitted it will wear a long time with very little leakage, and what there may be will be caught in the annular grooves in the side of the piston and passed at once through the exhaust passages, thus preventing any leakage through the piston-rod.' The drawings show a detached piston-rod, and all the coöperative devices are conformed and adjusted to a detached rod, such as the long sleeve in the cylinder, to guide it, and the collar on the end of the rod to limit its movements.

"It is impossible to ignore the particular construction of these two parts which is thus pointed out as material. As the defendant's bell-ringer does not contain such a piston or piston-rod, infringement is not shown. The bill is therefore dismissed." 18 Fed. Rep. 602.

On this appeal, it is argued on behalf of the appellants, that this construction of their patent is too narrow; and it is now contended that the detachment of the piston and piston-rod is not an essential part of the description and claim of the invention patented. We cannot, however, but agree with the circuit judge, that the language of the specification limits the first claim to a combination in which the piston and piston-rod are detached from each other. In describing his invention in the introductory part of the specification, the patentee manifestly divides it into two parts; the first relates "to the con-

struction of a steam bell-ringer in such a manner as to prevent any apparent leakage, either of water or steam, without resorting to the use of stuffing-boxes;" the second, "to cause the admission and release of the steam directly by the motion of the piston, and without the use of any intermediate parts between the piston and valves." The first claim covers the first part of this invention by "the combination of the cylinder A, piston G, piston-rod D, slotted rod C, and crank B, when constructed and operated substantially as described." The second claim, which we need not further consider here, because not involved in the case, covers the second part of the invention.

In the description of the device, with reference to the drawings, the specification says: "The piston G is disconnected from its rod D, to prevent any lateral strain being communicated to it, thereby decreasing to some extent the wear of the piston in the cylinder."

It is not admissible to adopt the argument made on behalf of the appellants, that this language is to be taken as a mere recommendation by the patentee of the manner in which he prefers to arrange these parts of his machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement of the piston and piston-rod. The arrangement of the valves, as shown in the drawings, he declared not to be essential, and explained how they might be otherwise adjusted, and the comparative advantage and disadvantage of those plans; but no such language is used in reference to the connection between the piston and its rod. And when we compare the device as described in the specifications of the patent sued on with that of the patent of 1854, in which it was necessary to use stuffing-boxes, and consider that one of the express objects expected to be accomplished by the improvement contained in the patent of 1872 was to prevent leakage of water or steam without resort to stuffing-boxes, the conclusion seems unavoidable that the patentee intended the detachment of the piston from its rod as an essential part of the combination to be covered by the first claim.

The decree of the Circuit Court is therefore *Affirmed.*

PENINSULAR IRON COMPANY *v.* STONE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA, EASTERN DIVISION.

Argued April 18, 1887. — Decided May 2, 1887.

The rights of each and all of the parties in this case being separate and distinct, but depending on one contract, they elected to join in enforcing the common obligation; and, as one citizen of Ohio is a necessary party on one side, and another citizen of that state a necessary party on the other, with interests so conflicting that the relief prayed for cannot be had without keeping them opposed, the cause is remanded (with costs against the appellants in this court) to the Circuit Court with directions to dismiss it for want of jurisdiction.

THIS was a bill in equity to compel an accounting. The case is stated in the opinion of the court.

Mr. Andrew Howell for appellants. The court did not desire to hear further argument. *Mr. W. A. Underwood* filed an argument and brief for appellants.

Mr. James H. Anderson filed a brief for appellees.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an appeal from a decree dismissing the bill in a suit in equity begun by certain citizens of Michigan and Samuel M. Carpenter, Charles Wason, and Leander M. Hubby, citizens of Ohio, against Andros B. Stone, a citizen of New York, The St. Louis, Keokuk and Northwestern Railway Company, an Iowa corporation, the Chicago, Burlington and Quincy Railroad Company, an Illinois corporation, and Dan. P. Eels, a citizen of Ohio, to bring the defendants Stone and Eels to an accounting under a certain contract made by Stone with the complainants and others, by which he was to purchase the property of the Mississippi Valley and Western Railway Company, about to be sold under a decree of foreclosure, and hold the same in

trust for such of the holders of the bonds secured by the foreclosed mortgage as should surrender their bonds to him for use in paying the purchase-money, and contribute such further sums in cash as should be necessary to enable him to meet the obligations of his bid at the sale. According to the allegations of the bill the defendant Eels became a trustee of the proceeds of a sale of the purchased property, made by Stone for the benefit of the parties in interest, which he has misappropriated and claims to hold in connection with Stone, adversely to the complainants and others in like interest. The character of the controversy is such that all the citizens of Ohio, who are parties to the suit, cannot be placed on one side so as to give the Circuit Court jurisdiction, under the construction which was given the second section of the act of March 3, 1875, c. 137, 18 Stat. 470, in the *Removal Cases*, 100 U. S. 457, the first section being the same as the second so far as this question is concerned.

In *Strawbridge* v. *Curtiss*, 3 Cranch, 267, decided in 1806, it was held: "Where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." "But," it was added, "the court does not mean to give an opinion in the case where several parties represent several distinct interests, and some of those parties are, and others are not, competent to sue, or liable to be sued, in the courts of the United States." In *New Orleans* v. *Winter*, 1 Wheat. 91, decided in 1816, a suit had been brought in the District Court for the District of Louisiana by the heirs of Elisha Winter, deceased, to recover possession of certain lands under an alleged grant from the Spanish government. One of the plaintiffs could sue in the courts of the United States, but the others could not, and the question of jurisdiction in the District Court was raised. Chief Justice Marshall, in delivering the opinion of the court, after referring to what had been decided in *Strawbridge* v. *Curtiss*, said: "In this case, it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which

they were compelled to unite." It was consequently held that the District Court had no jurisdiction, and its judgment was reversed. This rule has been adhered to steadily ever since; *Barney* v. *Baltimore*, 6 Wall. 280, 287; *Coal Company* v. *Blatchford*, 11 Wall. 173, 174; *Sewing Machine Cases*, 18 Wall. 553, 574; and in removal cases, under § 2 of the act of 1875, it has uniformly been applied, unless there is a separable controversy. *Removal Cases*, 100 U. S. 457; *Blake* v. *M'Kim*, 103 U. S. 336; *Hyde* v. *Ruble*, 104 U. S. 407, and numerous cases since.

In the present case the rights of each and all of the parties depend on the alleged contract with Stone, and although, as between themselves, they have separate and distinct interests, they join in a suit to enforce an obligation which is common to all. There is but a single cause of action, and while all the complainants need not have joined in enforcing it, they have done so, and this, under the rule in *New Orleans* v. *Winter*, controls the jurisdiction. It is, therefore, a suit to which citizens of Ohio are parties on one side and a citizen of Ohio a party on the other, with interests so conflicting that the relief prayed cannot be had without keeping them on opposite sides of the matter in dispute. It follows that the Circuit Court was without jurisdiction, and could not render a decree dismissing the bill on its merits. For this reason the decree must be reversed, *Continental Insurance Co.* v. *Rhoads*, 119 U. S. 237, 239, and cases there cited; but as the error is attributable to the present appellants, whose duty it was to make the jurisdiction appear, the reversal will be at their costs in this court. *Everhart* v. *Huntsville College*, 120 U. S. 223.

The decree is reversed and the cause remanded, with directions to dismiss the bill for want of jurisdiction, and without prejudice.

LAWRENCE *v.* MORGAN'S RAILROAD AND STEAMSHIP COMPANY.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Submitted April 21, 1887. — Decided May 2, 1887.

Land in Louisiana claimed by L., a citizen of New Jersey, having been seized on an execution recovered in a state court of Louisiana, L. filed "a petition of third opposition" under the practice in that state, asking for an injunction against the sheriff to restrain the sale. It was stated in the petition that the state judge of the district was absent from the state, and an order of injunction was granted by the clerk of the court under circumstances set out in the opinion of this court. L. then petitioned for the removal of the cause to the Circuit Court, which was done. The Circuit Court remanded the cause to the state court. *Held*, that under the circumstances no injunction had been granted by the state court; that the case must be treated as having been taken to the Circuit Court to get an injunction; and that it was properly remanded.

APPEAL from an order remanding a cause to the state court from which it had been removed. The case is stated in the opinion of the court.

Mr. B. R. Forman for appellant and plaintiff in error.

Mr. Henry J. Leovy for appellees and defendants in error.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This is an appeal under § 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, from an order of the Circuit Court remanding a suit or proceeding which had been removed from a state court. The record shows that a *fieri facias* had been issued out of the 19th Judicial District Court for the Parish of St. Mary, Louisiana, on a judgment in that court at the suit of Robert Todd, trustee, against Robert B. Lawrence, under which certain lands claimed by Mrs. Frances E. Lawrence, a citizen of New Jersey, had been seized and advertised for sale on the second of June, 1883, by Minos Gordy, the sheriff of

the county. The judgment had been assigned to Morgan's Louisiana and Texas Railroad and Steamship Company, a Louisiana corporation, and on the 31st of May, 1883, Mrs. Lawrence caused to be prepared what is called in the practice of the courts of Lousiana a "petition of third opposition," to be filed in the 19th Judicial District Court of the Parish of St. Mary, to restrain Todd, the trustee, the railroad company, and the sheriff from selling the property under the seizure, claiming it as her own. This is a proceeding authorized by the Code of Practice of Louisiana, Arts. 395, 396, but it must be had in the court which rendered the judgment in virtue of which the seizure has been effected. Art. 397. The petition was verified by the oath of Mrs. Lawrence, May 31, and in her affidavit she stated "that Hon. T. S. Goode, the judge of the 19th Judicial District in and for the Parish of St. Mary, is absent from said parish." A bond was also executed on the same day, such as the Code of Practice required in case of the allowance of an injunction, and at the foot of the petition, as printed in the record, is the following:

"Considering the allegations and prayer of the foregoing petition, it is ordered that the third opposition of the plaintiff be, and is hereby, allowed to be filed, and that an order and writs of injunction issue, as prayed for, on plaintiff giving bond and security, according to law, in the amount equal to one-half of the claim under which the seizure enjoined was made.

"Granted at Franklin, parish of St. Mary, this 31st day of May, A.D. 1883.

"(Signed) J. B. VERDIM, Jr., *Clerk.*"

All these papers were filed with the clerk of the 19th Judicial District Court on the 1st of June, and also the following:

"PARISH OF ST. MARY, 1 *June*, 1883.

"I hereby accept service of the foregoing petition and writ of injunction herein prayed for, and waive service of citation on me in the premises.

"(Signed) M. T. GORDY, *Sheriff.*"

The record also shows a petition by Mrs. Lawrence to the judge of that court, setting forth that she had "sued out of your honorable court a third opposition, coupled with a writ of injunction" for the purpose of restraining the sale under the seizure, as above stated, and praying for the removal of such suit to the Circuit Court of the United States for the Eastern District of Louisiana on account of the citizenship of the parties, she being a citizen of New Jersey, and all the defendants citizens of Louisiana. At the foot of this petition, as printed in the record, is the following:

"On the pleadings and proceedings herein, and on the petition and bond filed herein by plaintiff, Mrs. Frances E. Lawrence, under the provisions of the acts and laws of the United States to regulate the removal of causes from state courts, and for other purposes, and on motion of counsel of petitioner in said case and the foregoing petition, it is ordered that the security offered by Mrs. Frances E. Lawrence, plaintiff therein, to wit, Townsend Lawrence, be approved, and that the state court proceed no further in the cause, and that this cause be removed into the Circuit Court of the United States for the Eastern District of the State of Louisiana next to be held in said district.

"Dated this 1st of June, 1883.

"(Signed) F. S. Goode, *Judge.*"

The petition for removal and this order were filed with the clerk of the court on the 2d of June. On the 5th of November following, the suit was entered in the Circuit Court, and, on the 20th of March, 1884, the defendants moved that it be remanded. This motion was heard April 5, 1884, and granted April 7. From the order to that effect this appeal was taken.

Section 720 of the Revised Statutes provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy;" and, in *Bondurant* v. *Watson*, 103 U. S. 281, 288, which was a suit removed from

a state court on the application of the defendant after an injunction staying proceedings in the state court for his benefit had been granted, it was said: "If Watson had filed his petition for injunction in the state court, and before it was allowed had petitioned for a removal of the cause to the Circuit Court, with the design of applying to that court for his injunction, the objection to the right of removal would have force. That would have been an evasion of the statute." Such clearly is this case. The petition for removal was filed by the party who brought the suit, and there is nothing whatever in the record to show that the injunction she asked for was ever granted by the court or any judge thereof prior to the removal. The affidavit of Mrs. Lawrence shows that the judge was absent from the parish at the time the order which is in the record signed by the clerk purports to have been granted; and we have been referred to no statute or judicial decision in Louisiana authorizing the clerk to make such an order in the absence of the judge. Under the circumstances, therefore, the case is to be treated as having been taken to the Circuit Court to get an injunction, and not after one had been granted. This, we have no hesitation in saying, cannot be done; and, without deciding whether, under any circumstances, a proceeding such as this was in the state court can be removed to a Circuit Court, we affirm the order to remand.

Affirmed.

NEW JERSEY STEAMBOAT COMPANY *v.* BROCKETT.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

Argued April 22, 1887. — Decided May 2, 1887.

When the contract of a common carrier with a passenger assigns to the latter a particular part of the vessel or vehicle to be occupied by him during transportation, and he voluntarily occupies a place different from that contracted for, the carrier is released from liability for injuries which necessarily arise from the passenger's change of place; but it

continues bound to furnish safe transportation, and to indemnify the passenger, under general rules of law, for injuries which do not directly arise by reason of his change of place, or which are caused by improper conduct of the carrier's servants, acting either in the scope of their general duties, or in the discharge of special duties imposed upon them.

A common carrier undertakes absolutely to protect its passengers against the misconduct or negligence of its own servants, employed in executing the contract of transportation, and acting within the general scope of their employment.

What will be misconduct on the part of the servants of a common carrier towards a passenger cannot be defined by a general rule applicable to every case, but must depend upon the particular circumstances in which they are required to act; and in this case the issue was fairly placed before the jury by the court.

Declarations made by one officer to another officer of a steamboat, while both are engaged in violently removing a passenger from a part of the vessel in which his contract of transportation did not entitle him to be, are admissible in evidence as part of the *res gestæ*, in an action brought by the passenger against the corporation owning the steamboat and transporting the passenger, to recover damages for injuries resulting from the assault.

This action was brought to recover damages sustained by the defendant in error, the plaintiff below, in consequence of personal injuries inflicted upon him by the employes of the plaintiff in error, a carrier of freight and passengers between the cities of Albany and New York, in the state of New York. A verdict and judgment having been rendered for the sum of five thousand five hundred dollars, the case was brought here for review, upon the ground that the court below committed errors of law in the conduct of the trial.

The plaintiff averred that he was received by the defendant as a deck passenger upon its boat, the Dean Richmond, at Albany, and that, in consideration of his having paid the price established for passengers of that class, it undertook to carry him safely to the city of New York, and thereby became bound that its servants and employes on said boat should not needlessly injure him while engaged in the discharge of their duties; that the defendant did not keep its contract, but broke the same, in that, by its servants on said boat, it needlessly and severely wounded him in his person during the voyage to New York, whereby he was put to great

Argument for Plaintiff in Error.

expense for surgical attendance, and whereby, also, incurable injuries were inflicted upon him. These allegations were accompanied by a statement of the circumstances under which, the plaintiff insists, the alleged wrongs were committed.

The answer denied generally that the company's agents or servants were guilty of negligence or improper conduct, and stated "that the plaintiff paid for a deck passage, and it received him on its boat as a deck passenger for passage to New York on a certain part of the boat allotted to deck passengers, as was well known to the plaintiff, and subject to long established rules and regulations of the defendant, including that mentioned in the complaint, of which the plaintiff had due and full notice; that the said rules and regulations were reasonable, and the defendant's officers and employes on the said boat were charged with the duty of enforcing them in a reasonable and proper way, without unnecessary force or violence, and the said rules and regulations and the officers and employes of the boat in uniform were well known to the plaintiff; that the plaintiff did not remain on the part of the boat allotted to deck passengers, and did not obey the said reasonable rules and regulations of defendant, but refused so to do, and contrary to the peace, quiet, good order, and safety of the said boat and its passengers, made a disturbance on the said boat, and the defendant neither used nor authorized any undue or unnecessary force or violence in the enforcement of the aforesaid rule and regulation, but the contrary thereof, and the plaintiff was not injured by any of the defendant's officers, employes, or agents, as alleged in the complaint."

The evidence was conflicting. The charge and the rulings of the court below are stated or referred to in the opinion of the court below.

Mr. W. P. Prentice and *Mr. James Lowndes* for plaintiff in error.

I. On the face of the complaint no cause of action is shown. The action was brought on a contract alleged to have been made between the parties. Now the contract on the part of

the company, alleged, was to carry the plaintiff as deck passenger, but the allegations of the complaint are in effect an admission that Brockett received his injury at a place on the deck where he was not entitled to be, under his contract. The complaint further alleged the existence of the regulations of the place for deck passengers, and that the action arose from the enforcement of this regulation by the watchman charged with such duty.

The disobedience and resistance of the defendant in error were admitted by him in his evidence. On the complaint and the evidence a verdict should have been directed for the plaintiff in error. *Marshall* v. *Hubbard*, 117 U. S. 415; *Gilmer* v. *Higley*, 110 U. S. 47; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478.

II. If it is said that Brockett need not aver compliance with his contract in respect of keeping himself on the stipulated deck, then it would follow that the contract does not bind him at all. If the injury had been inflicted on him on another boat, or on the wharf at Albany, or on the wharf at New York, could he recover under his contract, or would the cause of action be other than that averred in the complaint? The contract was to carry Brockett forward of the shaft. No duty arose to him under the contract as to any other place. *Gilmer* v. *Higley*, above cited.

III. On all the evidence the plaintiff was not entitled to recover, and the court erred in refusing so to instruct the jury. The plaintiff testified that his ticket contained these words, "deck passengers not allowed abaft the shaft." Placards up at the clerk's office, which he admits having seen, called his attention to the conditions of his passage. The ticket is the contract or the evidence of the contract. The complaint, however, does not state the important qualifications of the contract contained in the ticket, and the company was entitled to a verdict on the ground of this variance. But, if it is assumed that the contract was sufficiently pleaded, and the cause of action set forth by the necessary averments of a breach, the evidence failed to sustain a case so stated. Brockett was where he had no right to be. His injury was the result of an

accident in the fall upon the vessel in his scuffle with the watchman. And he himself admits that he had refused to obey orders and come down from the hops. He did not try to obey, but says, "I tried to get back." The jurisdiction of the action of defendant's servants was complete, unless the conversation after the accident, and the officers' acts after the accident added some new liability, and in respect to their subsequent acts, Brockett's evidence stands alone uncorroborated.

The plaintiff's evidence clearly was that the alleged injury was done to him abaft the shaft. He had no recollection of having gone forward of the shaft at all. And he resisted the effort to enforce the regulation to make him leave an improper place and come down from the hops.

The evidence on the part of the defendant company did not make any better case for the plaintiff. Every allegation, except those above stated, was denied by two or three witnesses, and no effort was made to impeach their credibility. Three witnesses sustain the watchman's story of the occurrences before and after the accident. The only additional evidence was that of the cross-examination of the watchman as to fights he had, subsequent to this occurrence, and when not in the employ of the company. The question upon the evidence was for the judge — whether the plaintiff's statement, uncorroborated, was sufficient to support a verdict in the face of the admitted facts and the other testimony by which he was contradicted. *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478; *Marion County* v. *Clark*, 94 U. S. 278; *Vanderbilt* v. *Richmond Turnpike Co.*, 2 N. Y. 479;[1] *Searles* v. *Manhattan Railway*, 101 N. Y. 661; *Culhane* v. *N. Y. C. & H. R. R.*, 60 N. Y. 133; *Higgins* v. *McRae*, 116 U. S. 671.

IV. The court erred in ruling "*if you believe that statement (of the plaintiff) to be true, then I say, as a matter of law, that there was more force than was necessary to accomplish the result, and the plaintiff is entitled to a verdict*," while refusing to rule that if the plaintiff, by his own fault, got involved in a personal quarrel with the watchman, and was injured in consequence of such quarrel, he cannot have relief in this

[1] *S. C.* 15 Am. Dec. 315.

action against the defendant, but must look to the watchman.

The effect of the above instruction, and of the above refusal, taken together, was to put to the jury the plaintiff's case, without any qualification, and to take away from it one important feature of the company's case.

It is not disputed that Brockett was in a position in which he had no right to be, and which was unsafe, and that he did not obey the order to come down. The right of the company by its servant to remove him, is not in dispute. It is not disputed that Thiel took hold of Brockett and that Brockett fell. The taking hold of him was lawful as a means of removing him. Brockett says, "*I didn't try to come down, I tried to get back.*" Thiel testified that the consequent fall was an accident due to the derangement of the boxes. If so, the injury to Brockett was the consequence of his own fault. But the charge ignored these circumstances, and in effect, made the laying hold of Brockett, by Thiel, the actionable conduct. It suggested also, a responsibility of the company, for acts after the accident, which was denied on the strongest evidence. *Barney* v. *Oyster Bay & Huntington Steamboat Co.*, 67 N. Y. 301.

But, in addition to the facts above referred to, there was evidence to the fact that Brockett struck Thiel before the latter had laid hands on the former. This evidence changed the whole transaction. Brockett was not at liberty to strike the company's servants. If he did so, he had to bear the consequences of his conduct. Story on Agency, p. 318. The jury could not but have been misled by the charge and the refusal to charge. The charge in effect discredited the company's evidence, and gave weight to Brockett's statement of occurrences after the accident and after he had received his injury. *Thorney* v. *London, Brighton & South Coast Railway*, 3 C. B. 368; *Ætna L. Ins. Co.* v. *France*, 91 U. S. 510.

V. The court erred in admitting testimony which must have greatly prejudiced the jury against the defendant company.

1. Brockett testified against objection that a man wearing the uniform of the company approached after his fall and said, "You farmers are so stingy — you are too stingy to buy

a stateroom and you ought to be killed." The case was one in which it was of great importance to the defendant company that the issues should be submitted to the jury without irrelevant matter. Instead of that method of trial, evidence was introduced of declarations after the event which constituted no part of the *res gestas*. The declarations were not only calculated to excite prejudice in the minds of a class, which probably was represented on the jury, but must have affected the mind of any humane man. It is not too much to say that after these declarations were introduced in evidence, the company could not get an impartial consideration of its evidence. The object of the rules of evidence in our system is to prevent the influence upon the jury of such irrelevant matter. *The company is not liable in law for the brutal language of its servants.*

2. The company's witness, Thiel, was permitted, on cross-examination, to say that he had been engaged in several fights. This evidence was irrelevant and prejudiced the defendant company. The point is whether the question eliciting it could be properly put, on cross-examination, when it was not to impair the credibility of the witness, as the purpose of the question was stated when the court ruled upon it. The evidence was not connected in any way with the testimony of Thiel on his direct examination, and was injurious to the company. It was, therefore, incompetent in the federal courts. *Oil Company* v. *Van Etten*, 107 U. S. 325; *Wills* v. *Russell*, 100 U. S. 621; *Burley* v. *German-American Bank*, 111 U. S. 216; *Philadelphia & Trenton Railroad* v. *Stimpson*, 14 Pet. 448, 460; *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99.

3. Evidence was admitted, against objection, of visits made to Brockett by officers of the company. Such testimony was irrelevant, and was injurious to the defendant company.

Mr. Eugene E. Sheldon for defendant in error.

Mr. Justice Harlan, after stating the case as above reported, delivered the opinion of the court.

We will not extend this opinion by a recital of all the facts and circumstances established by the proof. It is sufficient to say that there was evidence tending to sustain both the allegations of the complaint and the averments in the answer. In view of the serious conflict in the statements of witnesses, the case was one peculiarly for the determination of a jury, under appropriate instructions as to the law. The court, therefore, rightfully refused to direct a verdict for the company, unless, as claimed, the plaintiff, according to his complaint and the evidence, had no cause of action.

It appears from the complaint that the company had a regulation restricting deck passengers to a particular part of the boat; but of the existence of that rule, the plaintiff averred, he did not, at the time, have notice. It also appears by uncontradicted evidence that, upon the ticket purchased by the plaintiff, were printed the words "deck passengers not allowed abaft the shaft," and that placards, in different parts of the boat, indicated the place on it which such passengers were prohibited from occupying. As the plaintiff was "abaft the shaft" when injured, no case, it is insisted, was made that would sustain an action upon the contract of transportation; consequently, it is contended, the request to instruct the jury to find for the defendant should have been granted. This argument assumes that the plaintiff could not claim protection under the contract for safe transportation in respect to an injury done him by the company's servants while he was upon a part of the boat other than that to which he was restricted by the rule or regulation printed on his ticket. This position cannot be sustained. We shall not stop to inquire whether the regulation in question is shown to be a part of the contract for transportation; and we assume, for the purposes of this case, that the plaintiff stipulated that, during the voyage, he would remain upon the part of the boat to which deck passengers were assigned; still, it would not follow that his violation of that stipulation deprived him of the benefit of his contract. Such violation only gave the carrier the right to compel him to conform to its regulation, or, upon his refusing to do so, to require him to leave the boat, using,

in either case, only such force as the circumstances reasonably justified. If the injuries necessarily arose from his violation of the regulation established for deck passengers, the carrier would not be responsible therefor. But if they were not the necessary result of his being, at the time, on a part of the boat where he had no right to be, and were directly caused by the improper conduct of the carrier's servants, either while acting within the scope of their general employment, or when in the discharge of special duties imposed upon them, he is not precluded from claiming the benefit of the contract for safe transportation.

The plaintiff was entitled, in virtue of that contract, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the company's business, and when acting within the general scope of their employment, is, of necessity to be imputed to the corporation, which constituted them agents for the performance of its contract with the passenger. Whether the act of the servant be one of omission or commission, whether negligent or fraudulent, "if," as was adjudged in *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468, 486, "it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment." See also *Philadelphia, Wilmington & Baltimore Railroad* v. *Quigley*, 21 How. 202, 210. "This rule," the Court of Appeals of New York well says, "is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed." *Higgins* v. *Watervliet Turnpike Co.*, 46 N. Y. 23, 27. The principle is peculiarly applicable as between carriers and passengers; for, as held by the same court in *Stewart* v. *Brooklyn & Crosstown Railroad*, 90 N. Y. 588, 591, a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against

the misconduct of its own servants engaged in executing the contract.

What will be misconduct on the part of its servants towards a passenger cannot be defined by a general rule applicable to every case, but must depend upon the particular circumstances in which they are required to act. In the enforcement of reasonable regulations established by the carrier for the conduct of its business, the servant may be obliged to use force. But the law will not protect the carrier if the servant uses excessive or unnecessary force. This doctrine is well illustrated in *Sanford* v. *Eighth Avenue Railroad*, 23 N. Y. 343, 345.[1] In that case it appeared that the plaintiff's intestate got upon a street railroad car in the night time, and, after being shown to a seat, refused, without sufficient cause, to pay his fare. He was ordered to leave the car, and, failing to do so, the conductor led him to the forward platform, and, without stopping the car, forcibly ejected him therefrom. The injuries received by the passenger resulted in his death. The court said: "It must be conceded that the conductor had a right to expel the intestate for the reason that he would not pay his fare when asked to do so. But this was not a right to be exercised in a manner regardless of all consequences. A person cannot be thrown from a railroad train in rapid motion without the most imminent danger to life; and, although he may be justly liable to expulsion, he may lawfully resist an attempt to expel him in such a case. As the refusal of a passenger to pay his fare will not justify homicide, so it fails to justify any act which in itself puts human life in peril; and the passenger has the same right to repel an attempt to eject him, when such attempt will endanger him, that he has to resist a direct attempt to take his life. The great law of self-preservation so plainly establishes this conclusion that no further argument is necessary. . . . It is said that the intestate offered resistance when he was thus seized. But this he had a right to do in order to save life, which he had not forfeited by refusing to pay the fare. He was liable, as we said, to be expelled, and the conductor's assault would have

[1] *S. C.* 80 Am. Dec. 286.

been justified if the car had been stopped, and the expulsion had been made without unnecessary violence. But, as the conductor had no right to make the assault, when he did and as he did, so the law will justify such resistance as was offered to that assault." See also *Hoffman* v. *New York Central & Hudson River Railroad*, 87 N. Y. 25; *Rounds* v. *Delaware, &c., Railroad*, 64 N. Y. 129, 134; *Lynch* v. *Metropolitan Railway*, 90 N. Y. 77; *Ramsden* v. *Boston & Albany Railroad*, 104 Mass. 117, 121; *Noble* v. *Cunningham*, 74 Ill. 51, 53; *Northwestern Railroad* v. *Hack*, 66 Ill. 242; *Robinson* v. *Webb*, 11 Bush, 464, 482.

In the present case the jury were instructed, in substance, that the plaintiff had no right to be in any part of the boat except that assigned to deck passengers, and that the carrier's servants had the right — using no more force than was necessary — to remove him from the place where he was found by the watchman. Referring to the testimony of the plaintiff, the court observed: "He says that he went upon the bales of hops, remained there a short time, went to sleep, and was awakened by the watchman, Thiel, striking him with a cane; that he struck him first on the feet, afterwards in the face, and told him to get down. He asked Thiel if he was doing any harm there, and asked to be allowed to stay. Part of the answer was, 'Get down, come down.' The assault upon him continuing, he then put up his satchel for protection, and was thereupon caught by the collar of his coat and pulled headlong from the freight, his shoulder striking one of the barrels standing near, dislocating it or causing the injury which has been described. He says that upon regaining his feet he was again struck by the watchman. Soon after another officer of the boat came and he was pushed towards the shaft and told that was the part of the boat for him to remain in; that he went to the barber shop, and there for the first time read his ticket and saw the requirement in reference to deck passengers. That very briefly is the statement of the plaintiff." The court proceeded: "If you believe that statement to be true, then I say, as a matter of law, that there was more force than was necessary to accomplish the result, and the plain-

tiff is entitled to a verdict." To this last part of the charge the defendant took an exception. But we perceive no ground upon which the exception can properly rest. If the statements of the plaintiff were true, then neither argument nor citation of authorities is necessary to show that undue force was used by the company's servants. And it was the right of the court to so instruct the jury.

But that the jury might, also, have in mind the case as made by the defendant, the court said: "On the other hand, you have the testimony of the witness Thiel, who says he came to the freight two or three times before the transaction and told plaintiff to get down; that the other passengers all got down; that on the third occasion he stepped on a box and told him to come down; that the plaintiff, instead of doing so, endeavored to climb higher or get away from him; that the plaintiff kicked him in the breast, and in the excitement he caught hold of him, and in the struggle which ensued, the boxes, the plaintiff, and the witness came down together in a crash upon the floor. If you believe that statement, then the plaintiff brought this assault upon himself; it was an unavoidable accident, and the plaintiff is not entitled to recover. Other witnesses have been called, who in part corroborate the story of the watchman, and in some particulars corroborate the story of the plaintiff."

The whole case was thus fairly placed before the jury upon the issue, as to whether the defendant's servants, in executing its regulation as to deck passengers, used unwarrantable force and thereby caused the injuries of which the plaintiff complains.

One objection made by the defendant to the admission of evidence deserves to be noticed. The plaintiff in his evidence described the manner in which, as is contended, he was dragged by the watchman from the boxes. After stating that he was thrown to the floor, and was being roughly pushed by the watchman, he proceeded: "*Then* I saw another man coming with the uniform of the boat on, and the cap, and he said: 'All such men as you ought to be killed.' I says, 'What do you want to kill me for?' he says, 'You farmers are so stingy,

you are too stingy to buy a state-room, and you ought to be killed.' I said, 'You ought not to call me stingy;' then he said, 'Have you looked at your ticket?' I think he had 'third assistant mate' on his cap, the cap had a yellow cord, the same as the officers of the boat wore." It appeared, in proof, that the person here referred to was one of the mates of the Richmond.

The defendant objected, at the trial, to the competency of the statements of the mate. The objection was overruled and an exception taken. It is now insisted that the defendant is not responsible for the brutal language of its servants, and that the declarations of the mate to the plaintiff were not competent as evidence against the carrier. We are of opinion that these declarations constituted a part of the *res gestæ*. They were made by one servant of the defendant while assisting another servant in enforcing its regulation as to deck passengers. They were made when the watchman and the mate, according to the evidence of the plaintiff, were both in the very act of violently "pushing" him, while in a helpless condition, to that part of the boat assigned to deck passengers. Plainly, therefore, they had some relation to the inquiry, whether the enforcement of that regulation was attended with unnecessary or cruel severity. They accompanied and explained the acts of the defendant's servants out of which directly arose the injuries inflicted upon the plaintiff. *Vicksburg & Meridian Railroad* v. *O'Brien*, 119 U. S. 99, 105; *Ohio & Mississippi Railway* v. *Porter*, 92 Ill. 437, 439; *Toledo & Wabash Railway* v. *Goddard*, 25 Ind. 185, 190, 191. As bearing upon this point, it may be stated that the jury were instructed that the case, as presented, did not authorize vindictive or punitive damages, and that in no event could they award the plaintiff any larger amount than would reasonably compensate him for the injuries received; thus guarding against undue weight being given to the harsh words of the company's servants, apart from their acts.

Other questions arise upon the admission of evidence against the objection of the defendant; upon the refusal of the court to grant requests for instructions in its behalf; and upon cer-

tain parts of the charge, to which it excepted. In our opinion none of these questions require consideration; and the action of the court, in respect to them, constitutes no ground for the reversal of the judgment. The charge of the court embodied all that need have been said. It correctly stated the propositions of law arising in the case. No substantial error having been committed, the judgment is

Affirmed.

APPENDIX.

MR. JUSTICE WOODS.

SUPREME COURT OF THE UNITED STATES.

MONDAY, May 16, 1887.

MR. CHIEF JUSTICE WAITE, upon the meeting of the court, made the following announcement:

As a mark of respect to the memory of MR. JUSTICE WOODS, who died in this city on Saturday last, no business will be done in court to-day, and, that the judges may attend the funeral at Newark, Ohio, to-morrow, we will now adjourn until Monday next, when motions noticed for to-day will be heard, and a later time in the week fixed for closing the term.

Adjourned until Monday, May 23, at twelve o'clock.

The burial service of the Protestant Episcopal Church was said over his remains in Washington, on the evening of the 16th of May, by the Reverend Dr. Giesy; and the CHIEF JUSTICE and MR. JUSTICE GRAY accompanied them to their place of interment, at Newark,

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CIRCUIT COURTS OF THE UNITED STATES.

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CLAIMS AGAINST THE UNITED STATES.

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MAXWELL LAND GRANT.

1. It does not satisfactorily appear that the grant of Governor Armijo of 1841 to Beaubien and Miranda, since ascertained to amount to 1,714,764.94 acres, was of that character which, by the decree of the Mexican Congress of 1824, was limited to eleven square leagues of land for each grantee. *Maxwell Land-Grant Case*, 325.
2. It does appear that, though the attention of Congress was turned to this question, it confirmed the grant in the act of June 21, 1860, to the full extent of the boundaries as described in the petition of claimants. *Ib.*
3. In such case the courts have no jurisdiction to limit the grant, as the Constitution, by Article IV, § 1, vests the control of the public lands in Congress. *Tameling* v. *United States Freehold Co.*, 93 U. S. 644. *Ib.*
4. In this case the evidence produces no conviction in the judicial mind of the mistakes or frauds alleged in the bill, and the decree of the Circuit Court dismissing it is affirmed. *Ib.*

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MINERAL LAND.

Where a party was in possession of a mining claim in the Black Hills of Dakota, within the Indian reservation, on the 28th day of February, 1877, (the day when the Indian reservation was given up, and the land in which the mine existed was ceded back to the United States,) with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, with a disclosed vein of ore, he could, by adopting what had been done, causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his rights from that day; and such location, labor, and improvements gave him the right of possession. *Noonan* v. *Caledonia Mining Co.*, 393.

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See RAILROAD.

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW, B, 1;

LOCAL LAW, 1, 2;

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NATIONAL BANK.

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RECOUPMENT.

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been found by the court; and that if there was no passage known as "northern," the vessel was bound to take the one which would carry it in a northerly direction through the coolest waters into the coolest temperature, and the court should have ascertained from the proof what passages between Gibraltar and Boston vessels were accustomed to take, and should have determined which of them the contract permitted the vessel to choose. *The John H. Pearson*, 469.

STATUTE.

A. Construction of Statutes.

When Congress adopts a state system of jurisprudence, and incorporates it, substantially in the language of the statute of the State creating it, into the Federal legislation for the District of Columbia, it must be presumed to have adopted it as understood in the state of its origin, and not as it might be affected by previous rules of law, either prevailing in Maryland, or recognized in the courts of the District. *Metropolitan Railroad* v. *Moore*, 558.

See Statute, B.

B. Statutes of the United States.

To constitute a collusive assignment under § 5 of the act of March 3, 1875, c. 137, when the title made by the transfer is complete so as to give the assignee power to maintain suit in his own name, it must appear that the object of the transfer was to create a case cognizable under the act of 1875. *Lanier* v. *Nash*, 404.

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C. Statutes of States and Territories.

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